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JUDICIAL MODIFICATION OF SENTENCES IN MARYLAND

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I. INTRODUCTION

In Maryland, judges who hand out criminal sentences have very broad power to subsequently reduce those sentences.¹ The sentencing judge may reduce a sentence at any time for any reason, as long as the defendant has filed a motion to modify the sentence within ninety days.² Not only does the judge retain this power throughout the entirety of the defendant's sentence, it also allows him to modify a sentence to Probation Before Judgment ("PBJ") after the original sentence was served.

Although judges in most states have some power to revise sentences, in almost all others there is a time limit ranging from one week to one year, unless the modification is to correct a mistake or an illegal sentence.³ In the very few other states that give judges a longer period to modify a sentence, there are normally severe restrictions imposed.⁴

In the last few years, the broad power of Maryland judges to modify sentences has come under attack from many sources, including prose-

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1. Sentence reduction is controlled by Rule 4-345 of the Maryland Rules. Md. R. 4-345(b) (2003). See *infra* note 16 and accompanying text for the text of this rule.
2. See *State v. Robinson*, 106 Md. App. 720, 723, 666 A.2d 909, 911 (1995). See *infra* notes 18-37 and accompanying text for a discussion of this case. See also Md. R. 4-345(b).
3. See *infra* Part III (reviewing the law in other states).
4. See *infra* notes 84-90 and accompanying text.

cutors, victims' rights advocates, members of the state legislature, and the media.⁵ Those opposing the practice have cited a few specific cases where the power has been abused, such as when violent criminals serving long sentences were released early without notification to victims.⁶ Recent amendments to the law have added significant procedural safeguards to the process, such as a requirement of a hearing, notice to victims, and a requirement of a decision, with explanation, on the record.⁷

Yet opponents of the practice would still like to see it abolished or significantly curtailed. One bill, introduced during the 2002 legislative session, would have imposed a one-year time limit on any sentence modifications.⁸ The bill was quite controversial and received support from the then Lieutenant Governor, as well as victims' rights groups and prosecutors.⁹ The bill was opposed by both the criminal defense bar and by virtually all trial judges.¹⁰

During legislative hearings, it became clear that no one had an accurate picture of just how often and in what kinds of cases sentence modification was used. This was because virtually no jurisdictions or individual judges kept accurate and complete records of the granting and denial of such requests.

The authors of this Article were members of a task force formed by the Maryland State Bar Association ("MSBA") to conduct a study of the practice in Maryland.¹¹ The most important piece of this study

5. On February 4 and 5, 2001, the Washington Post ran two front-page articles criticizing the broad discretion given to judges in Maryland to reduce sentences, the use of that power by Maryland judges, and the failure of the legislature to act to amend the law. Lori Montgomery & Daniel LeDuc, *Crime, Punishment—Shaped by One Man; Loopholes Undo Mandatory Sentences*, WASH. POST, Feb. 5, 2001, at A1 [hereinafter *Loopholes*]; Lori Montgomery & Daniel LeDuc, *Sentences Without Finality; Judges Can Cut Terms for Whatever Reason—or No Reason*, WASH. POST, Feb. 4, 2001, at A1 [hereinafter *Sentences Without Finality*].

6. See, e.g., Montgomery & LeDuc, *Loopholes*, *supra* note 5 (describing a Maryland judge's use of sentencing modification power to cut the sentence of a man convicted of drug dealing and illegal possession of a handgun from twelve to five years); Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5 (describing another instance in which a judge reduced a five-year prison sentence to probation, thereby releasing a man who had killed another man in an altercation over money).

7. See *infra* notes 67-71 and accompanying text (describing the amendments).

8. S. 73, 2002 Leg., Reg. Sess. (Md. 2002); H.D. 160, 2002 Leg., Reg. Sess. (Md. 2002).

9. On January 13, 2002, the Washington Post reported that "Townsend (D) has pledged that one of her top priorities this year is legislation to limit judges' ability to reduce criminals' time in prison . . ." Daniel LeDuc, *Townsend Seeks to Curb Judge's Role in Md. Legislature, Victim Advocates Target Power to Cut Sentences Years Later*, WASH. POST, Jan. 13, 2002, at C4.

10. *Id.*

11. Professor Grossman was chair of the Committee. In addition to Professor Shapiro, other members of the Committee included Professor José Anderson of the University of Baltimore and Buzz Winchester of the MSBA.

was a survey of all district and circuit court judges in Maryland. The Survey questioned the judges about their use of sentence modification, including how often they used the procedure, how long after sentencing, the types of cases in which modification was used, and the reasons for its uses.¹² The results of the Survey were reported to the criminal justice council of the MSBA and to the Maryland General Assembly.¹³

This Article grew out of that Survey and represents the views of the authors only and not the MSBA. Part II of this Article will first explain the law relating to, and history of, the judges' revisory power in Maryland. Part III will examine the law in other states and in federal courts. The Article will then look at how the purposes of sentence modification fit with various theories of punishment. Part V will review arguments for and against the procedure and explore alternatives for accomplishing the same goals. Part VI will report and interpret the results of the Survey of Maryland judges. Finally, the authors will give their conclusions as to the use of sentence modification in Maryland and their recommendations for any changes in the law.

The authors conclude that the overwhelming majority of cases in which the practice is used are for non-violent drug and theft offenses, where the possibility of sentence modification is a powerful incentive toward the completion of drug and alcohol treatment programs or toward restitution to the victim. Even many critics of the practice do not oppose its use in these cases. Although modification for these purposes normally takes place within one year of sentencing, there are many instances where judges need two or even three years to confirm that the defendant has completed his or her rehabilitation. A one-year time limit would significantly interfere with this process.

Sentence modification for persons serving more serious, often violent crimes, is much more controversial; although the number is much smaller, some cases do exist. In a few cases, the system has been abused or judges have failed to follow proper procedural guidelines. The authors believe, however, that, although sentence reduction should be used carefully and sparingly in cases where long prison sentences have been handed down, it is a useful tool in some cases and should not be restricted to only certain crimes or to a certain time period.

It is important that the procedural safeguards be strictly followed and that some form of centralized record-keeping be maintained. These protections would eliminate most improper uses of sentence

12. *See infra* Part VI; Appendix.

13. Professors Grossman and Anderson, along with Mr. Winchester, testified before the House Judiciary Committee on March 11, 2003. The results of the judges' survey were presented to the Senate Committee on Judicial Proceedings on February 27, 2003.

modification. They will also allow sentence modification to continue in the many cases where it is helpful to the rehabilitation of non-violent offenders, and in the few cases where it is warranted, even when the defendant has committed a serious crime of violence.

II. THE MARYLAND LAW OF SENTENCE MODIFICATION

A judge's power to modify a sentence in a criminal case is not new to Maryland law. As early as 1890, the Court of Appeals of Maryland recognized "the long-established principle that courts have power to set aside or change their judgments during the term at which they are entered."¹⁴ Since 1951, this power has been specified by court rules.¹⁵ The current governing rule reads, in pertinent part:

Rule 4-345. Sentencing – Revisory power of court.

....
(b) Modification or reduction – Time for. The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition (1) in the District Court, if an appeal has not been perfected, and (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (e) of this Rule. The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.¹⁶

The rule is clear that a judge has the power to modify a legally imposed sentence—not tainted by fraud, mistake or irregularity—only if the defendant files a motion within ninety days of its imposition.¹⁷ This requirement was held to be jurisdictional and has been strictly enforced. What is not so clear from the language of the rule is how long this power continues after a defendant has filed a timely motion. Must the judge rule on the motion within some time limit, or may he hold it *sub curia* for the length of the sentence?

Under the current rule, the question of whether there was any time limitation on a judge's power to reduce a properly imposed criminal sentence¹⁸ was specifically addressed by the Court of Special Appeals

14. *State v. Butler*, 72 Md. 98, 100, 18 A. 1105, 1106 (1890).

15. *See Robinson v. State*, 106 Md. App. 720, 722-23, 666 A.2d 909, 911 (1995).

16. Md. R. 4-345(b) (2003).

17. *Id.*

18. This article addresses only the question of a judge's power to *reduce*, not increase a sentence. A judge's power to increase a sentence is limited to correcting "an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the court-

of Maryland in *State v. Robinson*.¹⁹ In *Robinson*, the defendant was given a ten-year sentence in 1990 for various crimes, including assault with intent to maim.²⁰ Defendant filed a timely motion for sentence modification within ninety days of the imposition of the sentence.²¹ In 1994, four and one-half years after it had been imposed, the trial judge, following a hearing on the motion, modified the sentence by suspending the unserved portion of it and imposing a term of five-years probation.²² The state appealed, claiming that the trial judge lacked the authority to modify a sentence four and one-half years after it was imposed.²³ The court of special appeals, after a thorough review of the history of sentence modification in Maryland, held that a judge does have the power to modify the sentence at any time, as long as the motion to modify was filed within ninety days of the imposition of the sentence.²⁴

The court began its analysis by noting that under the common law, a court in Maryland had revisory power over its judgments, including the power to modify sentences, "only during the term of court in which the judgment was issued."²⁵ That limitation was changed in 1951 by Rule 10(c) of the General Rules of Practice and Procedure.²⁶ This rule provided the court the power to reduce a sentence within ninety days of its imposition.²⁷ The court had this power whether the defendant had moved for such modification or not, and retained this power for ninety days even if the term of one court might have expired and another begun.²⁸ The purpose of the new rule was to "ameliorate the harshness of the former practice."²⁹

room following the sentencing proceeding." *Id.* This restriction is required by the Double Jeopardy Clause of the United States Constitution. See U.S. CONST. amend. V. This article also does not address the question of a judge's power to correct an "illegal" sentence, which may be done "at any time." MD. R. 4-345(a).

19. 106 Md. App. 720, 666 A.2d 909.

20. *Id.* at 721, 666 A.2d at 910.

21. *Id.*

22. *Id.* at 721-22, 666 A.2d at 910.

23. *Id.*

24. *Id.* at 724, 666 A.2d at 912.

25. *Id.* at 722, 666 A.2d at 910; see also *Ayre v. State*, 291 Md. 155, 159-60, 433 A.2d 1150, 1153 (1981); *State v. Butler*, 72 Md. 98, 100-01, 18 A. 1105, 1106 (1890) (discussing the Maryland common law rule dealing with modification of judgments).

26. See generally *Madison v. State*, 205 Md. 425, 434, 109 A.2d 96, 100 (1954) (discussing the General Rules of Practice and Procedure, Part 4, Rule 10(c)).

27. *Id.* The rule applied in all criminal cases except those involving bastardy, desertion, and non-support. *Id.*

28. *Robinson*, 106 Md. App. at 722-23, 666 A.2d at 911.

29. *Johnson v. State*, 274 Md. 29, 40, 333 A.2d 37, 43 (1975). Under the former practice, the jurisdiction of the court to modify a sentence expired after the term in which the judgment had been entered. *Id.*

According to the *Robinson* court, “the time period within which a judge could modify [a] sentence was significantly expanded” in 1961 by Maryland Rule 764(b), which allowed the judge to modify a sentence “[f]or a period of ninety (90) days . . . after the imposition of a sentence . . . or thereafter pursuant to motion filed within such period”³⁰ This gave the trial court two available periods within which it could modify a sentence: within ninety days without a motion from counsel, or “thereafter” as long as a motion was filed within ninety days.³¹ The *Robinson* court determined that “[t]he term ‘thereafter’ was open-ended and there is no other reading that can be given it.”³²

Present Rule 4-345(b), and the rule in place when *Robinson* was decided, reads in pertinent part: “The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition”³³ The *Robinson* court interpreted this rule as taking away the judge’s power to modify sentences *sua sponte*, but leaving the judge’s power to modify pursuant to a timely motion intact without any time limitations.³⁴ The court stated that “[t]he second and longer time period for modification, triggered by the filing of a motion within 90 days, no longer enjoys the presence of the word ‘thereafter’ but is no less open ended.”³⁵

The state recognized that the ninety-day time limit for filing the motion might extend into a new term of court, but it argued that the judge’s power to grant that motion would end upon termination of that succeeding term.³⁶ The court rejected the state’s argument, which would have grafted a remnant of the old common law rule onto the new Rule.³⁷

The Court of Appeals of Maryland has not specifically addressed the issue of whether there is any time limitation on a judge’s power to revise a sentence, but it has given its seeming approval to the *Robinson* approach in *Greco v. State*.³⁸ In that case, the trial court had granted a defendant’s Motion for Reduction of Sentence eight years after imposition of the original sentence.³⁹ The defendant then filed another motion to modify within ninety days of the sentence reduction.⁴⁰ The

30. *Robinson*, 106 Md. App. at 723, 666 A.2d at 911; Md. R. 764(b)(1) (1957).

31. *Robinson*, 106 Md. App. at 723, 666 A.2d at 911.

32. *Id.*

33. Compare Md. R. 4-345(b) (2003), with Md. R. 4-345(b) (1995). See also *Robinson*, 106 Md. App. at 723, 666 A.2d at 911. The change from Rule 764(b)(1) to Rule 4-345(b) was made as part of the recodification of the Maryland Criminal Rules in 1984. Court of Appeals, Order of Apr. 6, 1984, effective July 1, 1984.

34. *Robinson*, 106 Md. App. at 723, 666 A.2d at 911.

35. *Id.*

36. *Id.* at 723-24, 666 A.2d at 911.

37. *Id.* at 723-24, 666 A.2d at 911-12.

38. 347 Md. 423, 701 A.2d 419 (1997).

39. *Id.* at 426, 701 A.2d at 420.

40. *Id.*

actual issue facing the court of appeals was whether the sentence reduction should be treated as an imposition of sentence, which would allow the defendant ninety days to file a second motion.⁴¹ In holding that it was an imposition of sentence, the court at least tacitly approved the original modification, even though it was eight years after the original sentencing.⁴²

Additionally, the *Greco* court cited *Robinson* for the proposition that there is no time limit on a judge's power to modify.⁴³ It also acknowledged that the Rules Committee had considered and rejected a recommendation that the rule be amended to impose a time limitation on the power to modify.⁴⁴ The Court of Appeals of Maryland, however, took note of two federal cases in which the court refused to allow sentence modification, pursuant to Federal Rule of Criminal Procedure 35(b), after eighteen and thirty months respectively.⁴⁵ Nevertheless, the court intimated that federal cases were not very helpful when interpreting the Maryland rule because of the much more limited power given judges under the federal rule.⁴⁶

The Maryland courts' reading of Rule 4-345(b), although reasonable, is not the only plausible interpretation. The appellate courts of one state with a rule similar to Maryland's have imposed a duty on the trial judge to rule "within a reasonable time after its filing."⁴⁷ Rule 35(b) of the Colorado Rules of Criminal Procedure reads, in pertinent part: "The court may reduce the sentence provided that a motion for reduction of sentence is filed . . . within 120 days after the sentence is imposed . . ."⁴⁸ In *Colorado v. Fuqua*, the defendant had filed a timely motion to modify.⁴⁹ The trial court, however, "apparently laboring under the notion that its jurisdiction was interminable, failed to rule on the motion until approximately eighteen months following the expiration of the 120-day filing period."⁵⁰ The Supreme Court of Colorado held that the sentencing court was under a duty to act "within a reasonable period of time," and if it did not so act, then it "becomes the defendant's obligation to make reasonable efforts to secure an expeditious ruling on the motion."⁵¹ If the defendant fails

41. *Id.* at 431-32, 701 A.2d at 423.

42. *See id.*

43. *See id.* at 435, 701 A.2d at 424-25.

44. *See id.*, at 424-25, 701 A.2d at 435.

45. *Id.* at 435-36, 701 A.2d at 425; *see also* United States v. Taylor, 768 F.2d 114, 118 (6th Cir. 1985) (questioning whether a delay of eighteen months in ruling on a Rule 35(b) motion is reasonable); *Diggs v. United States*, 740 F.2d 239, 246-47 (3d Cir. 1984) (holding that a decision on a Rule 35(b) motion was untimely thirty months after sentencing).

46. *See Greco*, 347 Md. at 436-37, 701 A.2d at 425-26.

47. *Colo. v. Fuqua*, 764 P.2d 56, 61 & n.4 (1988).

48. COLO. R. CRIM. P. 35(b) (1998).

49. *Fuqua*, 764 P.2d at 58.

50. *Id.* at 61.

51. *Id.*

to do so, "the motion for reduction should be deemed abandoned."⁵² The Colorado court made this ruling based on policy, rather than statutory construction. They held that a timely ruling was necessary to give "due deference to the principle of finality," "to relieve the sentenced defendant of needless uncertainty" and to allow "the Department of Corrections to structure a suitable program for the inmate and assign him to an appropriate correctional facility"⁵³

Until 1984, Federal Rule 35(b) was also similar to Maryland's present rule in that it allowed a court to modify a sentence if the defendant had filed a motion to modify within the rule's specified period of time—120 days for federal cases and ninety days for Maryland cases.⁵⁴ Although the rule did not contain a time limit on the court's action, the appellate courts read a requirement of "within a reasonable time" into the rule.⁵⁵ In 1985, it was amended to contain this explicitly.⁵⁶

As noted above, the Court of Appeals of Maryland, in *Greco v. State*, placed little weight on the federal cases which read a "reasonable time" limit into the federal rule because that rule is quite different than Maryland's, giving the judge virtually no opportunity to modify a sentence.⁵⁷ But the court failed to note that those opinions were written before the 1985 and 1987 amendments restricting federal judges' powers and were interpreting the federal rule when it was much more similar to the Maryland rule.⁵⁸

52. *Id.*

53. *Id.*

54. FED. R. CRIM. P. 35(b) (1983) & Advisory Committee's Notes; MD. R. 4.345(b) (2003) (amended 1992 & 2001).

55. See FED. R. CRIM. P. 35(b); see, e.g., *United States v. Taylor*, 768 F.2d 114, 116-17 n.3 (6th Cir. 1985) (observing that "a majority of circuits" viewed "that the district courts retain jurisdiction for a reasonable time beyond the 120 day period to consider timely Rule 35 motions"; this view was moot after Rule 35 was amended in 1987 to completely take away a judge's power to amend a valid sentence); *Diggs v. United States*, 740 F.2d 239, 245 (3d Cir. 1984) (holding that a district court has a "reasonable time" to decide a Rule 35(b) motion after the 120-day limit); *United States v. Krohn*, 700 F.2d 1033, 1035 (5th Cir. 1983) (holding that the district court retains jurisdiction for a reasonable time after the expiration of 120 days if a motion to reduce a sentence is properly filed within 120 days). *But cf.* *United States v. Kajevic*, 711 F.2d 767, 771 (7th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984) ("[W]e have serious doubts whether a district judge can ever reduce a sentence under Rule 35(b) after the 120-day time limit has passed.").

56. FED. R. CRIM. P. 35(b) (1985) & Advisory Committee's Notes; see also *United States v. Hayes*, 983 F.2d 78, 80 (7th Cir. 1992) (stating that Congress amended the rule in 1985 in reaction to the court's holding in *United States v. Kajevic*, 711 F.2d 767 (7th Cir. 1983), the pre-1985 version "only authorized District Courts to reduce sentences within 120 days"). The rule was amended again in 1987 to repeal the 120-day limit altogether. *Hayes*, 983 F.2d at 81.

57. See 347 Md. 423, 434-37, 701 A.2d 419, 424-26 (1997); see also *supra* note 46 and accompanying text.

58. See generally *Greco*, 347 Md. at 433-35, 701 A.2d at 424.

The fact that a judge may act on a motion years after it was filed, based on facts that were not in existence—or perhaps even contemplated—at the time of the motion, makes the Maryland procedure unique, not only in regard to sentence modification but in almost any area of the law. Broadly speaking, a motion is a request for a court to issue an order.⁵⁹ Normally, a motion must state the grounds for why it should be granted, based on facts in existence at the time the motion is made.⁶⁰ The motion is usually granted or denied within a reasonable time after being made, based on the facts presented in the motion. In some cases, the motion may be held by the court until some later part of the judicial process. For example, under Rule 12 of the Federal Rules of Civil Procedure, pretrial motions are normally “heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.”⁶¹

There are few areas of the law in which final judgments may be modified years after being made. With injunctions and other equitable orders, for example, the issuing court retains permanent jurisdiction to modify or dissolve the order.⁶² This, however, usually must be done by motion at the time the modification is requested, showing a change in circumstances between the time of its issuance and the time the motion is made.⁶³

It is somewhat surprising, therefore, that the Maryland courts have given Rule 4-345 such a broad interpretation. The court was clearly influenced by the language of the earlier version that allowed a court to modify a sentence “[f]or a period of ninety (90) days after the imposition of a sentence . . . or thereafter, pursuant to motion filed within such period”⁶⁴ Obviously, the drafters of this rule contemplated the granting of a motion after the ninety day period and chose to use the open-ended term “thereafter,” rather than a phrase such as “within a reasonable time thereafter.”⁶⁵ It was not, therefore, unreasonable for the *Robinson* court to interpret the framer’s intent of that earlier version as setting no time limit on the granting of a motion pursuant to a timely motion. The court was further justified in its interpretation because the rule’s legislative history lacked evidence demonstrating a desire to impose such a time limit when the rule was modified as part of the 1984 recodification.⁶⁶

59. A motion is a “written or oral application requesting a court to make a specified ruling or order.” BLACK’S LAW DICTIONARY 1031 (7th ed. 1999).

60. FED. R. CIV. P. 7(b), 11(b) (2001).

61. *Id.* at 12(d).

62. 42 AM. JUR. 2D *Injunctions* § 302 (2000).

63. *Id.* § 306.

64. MD. R. 764(b) (1957).

65. *Id.*

66. *See supra* note 33.

There has been only one amendment to Rule 4-345 since *Robinson*, and that involves not the timing, but the procedure used in sentence modification.⁶⁷ The 2001 amendment requires the State's Attorney to "give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form" when a sentence reduction hearing is to be held.⁶⁸ The amendment gives each victim, or victim's representative, the right to attend and testify at any such hearing.⁶⁹ Additionally, the rule requires the court to make a determination that the notice requirements have been complied with before holding the hearing.⁷⁰ Finally, "[i]f the court grants the motion, [it] ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based."⁷¹

III. THE LAW IN OTHER STATES AND IN THE FEDERAL COURTS

One of the arguments asserted by critics of Maryland judges' revisory power is that Maryland is the only state that gives judges unfettered discretion, with no time limitation, to modify legally imposed sentences.⁷² It is correct that the overwhelming majority of states give the judge one year or less to modify a sentence.⁷³ There are a handful of other states that allow longer time periods, but most of those impose strict limitations on the kinds of situations where this power may be used. Only two other states seem to have a power as broad, or nearly as broad, as in Maryland.⁷⁴

Most states allow an illegal sentence (i.e. one that exceeded the maximum penalty) to be corrected at any time,⁷⁵ but put much

67. See MD. R. 4-345 (2003) (amended 2001). *Robinson* was decided in 1995. *State v. Robinson*, 106 Md. App. 720, 666 A.2d 909 (1995).

68. MD. R. 4-345(c).

69. *Id.*

70. *Id.* at 4-345(d).

71. *Id.*

72. See *Robinson*, 106 Md. App. at 724, 666 A.2d at 912 (holding that Rule 4-345(b) engrafts no time limitation on the period within which a judge may act on a modification, "so long as the triggering condition of the filing of a motion within 90 days of the imposition of the sentence has been satisfied").

73. See *infra* notes 77-83 and accompanying text.

74. See ALA. CODE § 15-18-8(c) (1995 & Supp. 2002) (stating that the court retains jurisdiction throughout the sentence and may suspend that portion of the minimum sentence that remains); HAW. R. PENAL P. 35(b) (2003) (stating that a motion to reduce a sentence made within ninety days "shall empower the court to act on such motion even though the time period has expired"). See also *infra* notes 93-96 and accompanying text.

75. Many states have patterned their statutes or rules relating to correction of illegal sentences upon former Rule 35 of the Federal Rules of Civil Procedure, usually using the exact language of the former federal rule. See, e.g., DEL. CT. C.P.R. 35(a) (2003) ("Correction of sentence. - The court may correct an illegal sentence at any time . . ."); MD. R. 4-345(a) (2003) ("Illegal Sentence. The court may correct an illegal sentence at any time.").

tighter limits on a judge's power to modify a legally imposed sentence. The vast majority of states either deny judges any power to modify sentences⁷⁶ or give judges varying time limits between thirty days and one year to modify a sentence.⁷⁷ The most common time limits are ninety⁷⁸ and 120⁷⁹ days, although five states have a shorter limit,⁸⁰ and eight have either a 180-day or a one-year limit.⁸¹ In most states, the judge must actually reduce the sentence within the time limit.⁸² In a few states, if the defendant makes a motion to modify within the limit, the court has "a reasonable time" thereafter to rule on the motion.⁸³

Some of the states with a time limit of one year or less allow a longer or unlimited time period for modification, but impose severe restrictions on its use after the normal time limit expires. For example, in both California and Kansas, judges can modify sentences after 120 days only upon recommendation of the Director of Corrections.⁸⁴ In Delaware, a sentence may be modified after ninety days only in "ex-

76. Those states that do not appear to give trial judges statutory power to reduce legal sentences include Kentucky, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New York, Oregon, South Carolina, and Texas.

77. See *infra* notes 78-81.

78. Those states with a ninety day limit include: Arkansas (ARK. CODE ANN. § 16-90-111(b)(1) (Michie 1987 & Supp. 2003)); Delaware (DEL. CT. C.P.R. 35(b) (2003)); Minnesota (MINN. R. CRIM. P. 28.05(1), (2) (1995 & Supp. 2003)); New Mexico (N.M. R. CRIM. P. 5-801(b) (2003)); and Vermont (VT. CODE R. 35(b) (1983 & Supp. 2003)).

79. Those states with a 120 day limit include: California (CAL. PENAL CODE § 1170(d) (West 1985 & Supp. 2003)); Colorado (COLO. R. CRIM. P. 35(b) (1998 & Supp. 2002)); District of Columbia (D.C. R. CRIM. P. 35(b) (2003)); Idaho (IDAHO R. CRIM. P. 35 (2003)); Kansas (KAN. STAT. ANN. § 21-4603(d)(1)-(2) (1995)); North Dakota (N.D. R. CRIM. P. 35(b) (2002)); Pennsylvania (PA. R. CRIM. P. 720(B)(3)(a) (2001 & Supp. 2003)); Rhode Island (R.I. R. CRIM. P. 35(a) (2003)); Tennessee (TENN. R. CRIM. P. 35(b) (2003)); and West Virginia (W. VA. R. CRIM. P. 35(b) (2003)).

80. Those states with a time limit shorter than ninety or 120 days include: Florida (FLA. R. CRIM. P. 3.800(c) (1999 & Supp. 2003) (sixty days)); Illinois (730 ILL. COMP. STAT. ANN. 5/5-8-1(c) (West 1997 & Supp. 2003) (thirty days)); Louisiana (LA. CODE CRIM. PROC. ANN. arts. 822(A)(1),(C), 881.1(A)(1) (West 1997 & Supp. 2003) (thirty days)); Massachusetts (MASS. R. CRIM. P. 29(a) (2002) (sixty days)); and New Jersey (N.J. R. CRIM. P. 3:21-10(a) (2003) (seventy-five days)).

81. Those states with a 180 day or one-year limit include: Alaska (ALASKA STAT. § 12.55.088(a) (Michie 2002) (180 days)); Georgia (GA. CODE ANN. § 17-10-1(f) (1997 & Supp. 2003) (one year)); Indiana (IND. CODE ANN. § 35-38-1-17(a) (Michie 1998 & Supp. 2003) (one year)); Iowa (IOWA CODE ANN. § 902.4 (West 1994 & Supp. 2003) (one year)); Oklahoma (OKLA. STAT. ANN. tit. 22, § 982(a)(A) (West 1986 & Supp. 2003) (one year)); South Dakota (S.D. CODIFIED LAWS § 23A-31-1 (Michie 1998) (one year)); Wisconsin (WIS. STAT. ANN. § 973.19(2) (West 1998 & Supp. 2002) (180 days)); and Wyoming (WYO. R. CRIM. P. 35(b) (2003) (one year)).

82. See *supra* notes 78-81 and accompanying text.

83. See, e.g., D.C. R. CRIM. P. 35(b) (2003); 730 ILL. COMP. STAT. ANN. 5/5-8-1(c) (West 1997 & Supp. 2003).

84. See, e.g., CAL. PENAL CODE § 1170(d) (West 1985 & Supp. 2003); KAN. STAT. ANN. § 21-4603(e) (1995).

traordinary circumstances,"⁸⁵ and in Indiana after 365 days with approval of the prosecuting attorney.⁸⁶ In Wisconsin, where judges by statute have up to 180 days to modify sentences,⁸⁷ the state supreme court has held that sentencing courts have the "inherent power" to modify sentences during the entire term of the sentence, but only when "new factors" have been shown.⁸⁸ The Wisconsin courts have interpreted "new factor" very narrowly, not encompassing either the defendant's rehabilitation,⁸⁹ or a court's reconsideration of the fairness of the sentence based on a reweighing of the facts known at sentencing.⁹⁰

Presumably, those states with a short period for modification—120 days or less—did not intend that it be used either as a reward or a response to a defendant's rehabilitation—as it can be and often is used in Maryland—because little in the way of rehabilitation could be accomplished in such a short time. Rather, the most likely purpose of such statutes is to give the defendant an opportunity to ask the judge to reconsider the fairness of the original sentence, or to consider additional information that existed at the time of sentencing but was not presented. For example, the Supreme Court of Massachusetts stated: "Occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly should have been taken into account."⁹¹

In fact, some courts have held that a judge may not consider the defendant's behavior during incarceration following the sentence in deciding a motion to modify.⁹² In those states with a one-year limit, the modification power might be useful for rehabilitation purposes in at least some cases where the original sentence was not more than a few years.

85. DEL. CT. C.P.R. 35(b) (2003).

86. IND. CODE ANN. § 35-38-1-17(b) (Michie 1998 & Supp. 2003). Additionally, Indiana does allow sentence modification without approval of the prosecuting attorney where the court could have originally placed the defendant in a community corrections program and did not, but later does make such placement. *Id.* (Supp. 2003).

87. WIS. STAT. ANN. § 973.19(2) (West 1998 & Supp. 2002) (stating that the court shall, within ninety days after a motion to modify is filed, either determine the motion or extend the time for doing so by not more than an additional ninety days).

88. *Wis. v. Kluck*, 563 N.W.2d 468, 470 (1997).

89. *Id.* at 471.

90. *Wis. v. Grindemann*, 648 N.W.2d 507, 515 (Wis. Ct. App. 2002).

91. *Dist. Attorney for the N. Dist. v. Super. Ct.*, 172 N.E.2d 245, 250-51 (Mass. 1961).

92. *See, e.g., In re Clark*, 608 N.E.2d 1060, 1063 (Mass. App. Ct. 1993).

Judges in only two other states seem to have the kind of broad powers given to Maryland judges.⁹³ In Hawaii, pursuant to Rule 35 of the Rules of Penal Procedure, defendants have ninety days to file a motion to reduce their sentences.⁹⁴ Once the motion is made within the time period, the court is empowered “to act on such motion even though the time period has expired.”⁹⁵ There are no reported cases that place a time limit on the court’s actions. There are, however, also no cases in which an appellate court has specifically approved a sentence reduction long after the ninety day filing limit. In Alabama, although a judge may only modify a sentence within thirty days of its imposition, the court retains jurisdiction throughout the sentence “to suspend that portion of the minimum sentence that remains and place the defendant on probation”⁹⁶ Therefore, although Alabama judges have limited power to modify a sentence, they have significant and extended powers to have defendants released from prison before their sentences are served.

As this review shows, critics of sentence modification in Maryland are correct that Maryland law gives judges some of the broadest, if not the broadest, powers to modify sentences of all fifty states. It is one of only a handful of states that give judges both the time and discretion to use sentence modification as a rehabilitation tool. This unique status does not necessarily mean that Maryland law should be changed, but probably does put the burden of proof on those supporting the practice to show that it has benefits in comparison to the law of other states.

As for federal practice, not surprisingly, federal judges’ power to modify sentences has been severely curtailed, along with the narrowing of their discretion in original sentencing, with the imposition of strict, mandatory guidelines. Until a 1987 amendment, federal judges had the power to correct an illegal sentence “at any time,” and the power to reduce a sentence for any reason *sua sponte* within 120 days or within a reasonable time after 120 days pursuant to a motion filed by the defendant within that period.⁹⁷ That rule was similar to the rules now in effect in the majority of states, and in fact, many states’ rules were patterned after the federal rule.

93. See ALA. CODE § 15-8-8(c) (1995 & Supp. 2002) (stating that the court retains jurisdiction throughout the sentence and may suspend that portion of the minimum sentence that remains); HAW. R. PENAL P. 35(b) (2003) (stating that a motion to reduce a sentence made within ninety days “shall empower the court to act on such motion even though the time period has expired”).

94. HAW. R. PENAL P. 35(b).

95. *Id.*

96. ALA. CODE § 15-18-8(c).

97. FED. R. CRIM. P. 35(b) (1983); see also FED. R. CRIM. P. 35(b) (2003) & Advisory Committee’s Notes.

In 1987, at the same time that Congress mandated a sentencing system in which judges' discretion in sentencing was narrowed, Federal Rule 35 was amended also to curtail significantly federal judges' ability to reduce sentences.⁹⁸ Whereas courts previously had unlimited time to correct an illegal sentence, they now are given only seven days to "correct a sentence that resulted from arithmetical, technical, or other clear error."⁹⁹ Sentence reduction *sua sponte* or by motion of the defendant for any other reason was completely eliminated.¹⁰⁰ Other than the ability to correct "errors" within seven days, courts may only modify sentences upon motion of the government—usually within one year, but with some exceptions—and only if "the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person."¹⁰¹ Any sentence reduction under this rule must also be in accord with "the Sentencing Commission's guidelines and policy statements."¹⁰²

In addition to their power under Rule 35, federal judges also have the statutory power to reduce sentences in three very limited circumstances.¹⁰³ The first two may only be done pursuant to a motion by the Director of the Bureau of Prisons, either for: "extraordinary and compelling reasons," or if "the defendant is "at least 70 years of age, has served at least 30 years in prison," and "is not a danger to the safety of any other person or the community."¹⁰⁴ The third way can be done by the court *sua sponte* or upon a motion of the defendant in cases where the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."¹⁰⁵

IV. THEORIES OF PUNISHMENT

In order to best determine if the sentencing revisory power given judges is appropriate, it is critical to analyze which theories of punishment are part of a particular sovereign's penology goals, and then see if the revisory power meets these goals. Most experts separate the goals of punishment into four dominant theories: incapacitation, de-

98. See FED. R. CRIM. P. 35 (a), (b) (2003) & Advisory Committee's Notes.

99. *Id.* at 35(a).

100. See *id.* at 35(b) & Advisory Committee's Notes. Prior to the 1987 amendment, Rule 35 read, in relevant part, that "[a] motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked" *Id.*

101. *Id.* at 35(b)(1)(A).

102. *Id.* at 35(b)(1)(B).

103. See 18 U.S.C. § 3582(c) (2000).

104. *Id.* § 3582(c)(1)(A).

105. *Id.* § 3582(c)(2).

terrence, rehabilitation, and retribution.¹⁰⁶ Each theory needs to be completely understood before applied to a system that employs sentencing revision as a tool.

The first three of these theories are essentially utilitarian in nature.¹⁰⁷ That is, they look primarily to the future and hope to achieve a specific goal through the sentence imposed on the defendant.¹⁰⁸ When a system's sentencing ranges for a defendant are based in whole or in part on an individual or combination of these theories, it is making a statement regarding future goals for the defendant and others, and how it plans to achieve those goals.¹⁰⁹

The fourth theory, retribution, is only utilitarian by happenstance and is instead based upon principles of justice and morality.¹¹⁰ A sentencing system based on this theory is not primarily concerned with the modification or control of the defendant and others' behavior through the sentence imposed on the defendant, but instead on achieving justice for the government, defendant, and victim.¹¹¹ This difference is crucial to the approaches taken by many states¹¹² and the federal government through sentencing tools such as the revisory power and the Federal Sentencing Guidelines.¹¹³

Retribution, often called "just deserts" when advocated by those to the left of political center, is based upon the principles of justice.¹¹⁴ That is, each crime deserves a certain sentence or range of sentences that is commensurate with the harm done and the moral blameworthiness of the wrongdoer.¹¹⁵ A sentence that is substantially harsher than that which reflects the seriousness of the crime committed is un-

106. Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Courts Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003).

107. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENT* 45 (1976). See C. L. TEN, *CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* 7-8 (1987).

108. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 11 (1968).

109. See *id.*

110. JEFFRIE G. MURPHY, *RETRIBUTION RECONSIDERED* 21 (1992). See Packer, *supra* note 108, at 9-10. See generally J.D. Mabbott, *Punishment as a Corollary of Rule-Breaking*, in *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* 41 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

111. JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN PHILOSOPHY LAW* 229 (1979); see PACKER, *supra* note 108, at 37. One commentator observed, "[c]onsiderations of justice function as checks on social utility, weighing against promoting happiness if in so doing some people must be treated unfairly in the process." MURPHY, *supra*, at 150.

112. See Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 433 (2002).

113. See 18 U.S.C. § 3553(e)(2)(A) (2000).

114. See MURPHY, *supra* note 110, at 21-23; see also Erik Luna, *The Theory and Jurisprudence of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 255 (2002).

115. ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 31 (1985).

just and therefore immoral.¹¹⁶ A punishment that is too light fails to address the wrong done, diminishes the gravity of the crime committed,¹¹⁷ and ultimately erodes the moral compact of a free society.

Retribution is non-utilitarian in that its purpose is to further justice, rather than to achieve a socially useful goal.¹¹⁸ The utilitarian aspect of retribution occurs only in the broadest sense of its purpose.¹¹⁹ Retributionists believe that when a crime is committed, a wound is inflicted on society.¹²⁰ The only way to salve that wound is to apprehend the criminal and sentence him proportionally to the wrong he committed.¹²¹ But retributionists, unlike utilitarians, do not focus on whether the sentence will diminish the likelihood that the offender, or a similarly situated person, will harm society again.¹²² If a sentence is proportional to the seriousness of the crime, justice is served and the retributionist is satisfied.¹²³

Eighteenth-century criminologist Cesare Beccaria was perhaps the most influential advocate of justice-based punishments.¹²⁴ In his landmark work, *On Crimes and Punishments*,¹²⁵ Beccaria argued that punishments should not be based on who the offender was and his status in society, but rather on the particular crime that was committed.¹²⁶ Beccaria argued that people must be treated equally by the criminal justice system, regardless of their status or background.¹²⁷

116. *Id.* at 36. See H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 119, 121-22 (Gertrude Ezorsky ed., 1972).

117. TEN, *supra* note 107, at 159.

118. MURPHY, *supra* note 110, at 21.

119. See *id.*

120. See TEN, *supra* note 107, at 52-53.

121. MURPHY, *supra* note 110, at 23.

122. See generally *id.* at 21. Immanuel Kant expressed the retributionists' view by stating that:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things.

IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 100 (John Ladd ed. & trans., Bobbs-Merrill Co. 1965) (1797).

123. TEN, *supra* note 107, at 154. C.S. Lewis argued that "the concept of Desert is the only connecting link between punishment and justice." C.S. Lewis, *The Humanitarian Theory of Punishment*, in *CONTEMPORARY PUNISHMENT*, *supra* note 110, at 195.

124. Cesare Beccaria, at <http://www.criminology.fsu.edu/crimtheory/beccaria.htm> (last visited Nov. 3, 2003).

125. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci trans., Prentice Hall 1963) (1764).

126. *Id.* at 70.

127. *Id.*

Fairness and justice had to be the hallmarks of the legal system, and this was to be achieved by focusing on the seriousness of the crime and not the social status of the offender.¹²⁸ Part of Beccaria's approach to crime was the belief that crime was an act of freewill.¹²⁹ While certain factors increase the likelihood that some people will commit crime, the most important consideration is an individual's freewill and ability to act with his own volition.¹³⁰ As the decision to commit a crime is a volitional and immoral one, punishment should be based on the degree of moral wrong as well as the seriousness of the criminal act itself.¹³¹

Thus, Beccaria's belief in crime as an act of freewill and moral wrong, combined with his view that punishments should be fair for the offender as well as society, led him to be an advocate for retribution.¹³² Beccaria, however, also saw deterrence as a more utilitarian goal that could be achieved without excessively skewing the necessary proportional relationship between the seriousness of the crime and the harshness of the punishment.¹³³

There are two types of deterrence that can be used in sentencing: special (also referred to as specific) deterrence¹³⁴ and general deterrence.¹³⁵ Special deterrence seeks to make the price that the defendant will pay in either a fine or imprisonment high enough that he will be disinclined to engage in criminal activity again.¹³⁶ General deterrence makes a particular defendant's sentence a tool for modifying the behavior of others who might be contemplating committing a similar crime.¹³⁷ The result is that potential offenders will hear of the

128. *See id.*

129. *Id.* *See also* LEON RADZINOWICZ, *IDEOLOGY AND CRIME* 12-13 (1966) (discussing how this view of crime as the product of freewill makes both retribution and deterrence appropriate justifications for punishment).

130. BECCARIA, *supra* note 125, at 12-13.

131. One commentator describes the retributionist's approach that views the criminal as a rational actor as: "If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing to sacrifice in another way—namely, by paying the prescribed penalty." MURPHY, *supra* note 110, at 47. The criminal is morally responsible for his actions, which, to the retributionist, justifies infliction of punishment. TEN, *supra* note 107, at 46.

132. J.M. Burns & J.S. Mattina, *Sentencing*, in NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, *SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY, AND PRACTICE* 8 (1981); *see supra* notes 110-123 (discussing retributionist theories).

133. BECCARIA, *supra* note 125, at 62-63; *see also supra* notes 107-109 (discussing utilitarian theory).

134. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 12; *see also* PACKER, *supra* note 108, at 45.

135. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 12.

136. *Id.*; PACKER, *supra* note 108, at 45.

137. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 12; *see also* PACKER, *supra* note 108, at 39; *see also* Stanley I. Benn & Richard S. Peters, *The Utilitarian Case for Deterrence*, in *CONTEMPORARY PUNISHMENT*,

defendant's sentence and will decide that their own possible criminal behavior is not worth the punishment, because the price of the penalty is higher than the rewards that flow from the criminal conduct.¹³⁸

Deterrence-based punishments involve one and possibly two necessary elements (depending on whether special or general deterrence is the goal), the first somewhat theoretical, the second very practical.¹³⁹ Deterrence theory is based upon the view of crime as a rational act and is in line with the work of Beccaria.¹⁴⁰ Beccaria, unlike the positivists that would follow him, believed that crime was an act of free-will.¹⁴¹ He saw crime as the product of the criminal's rational decision that the rewards from the crime exceeded the likelihood of being apprehended and successfully prosecuted combined with the severity of the possible punishment.¹⁴² Beccaria and his followers believed that successful crime control would be achieved by tilting the balance just enough so that the criminal viewed the cost of being caught and punished as greater than the bounty from the crime itself.¹⁴³ With respect to specific deterrence, the judge should set the punishment just high enough to create a significant disincentive for future criminal behavior by the defendant himself.¹⁴⁴ Regarding general deterrence, the defendant's punishment should be set high enough so others contemplating the commission of a similar crime will be frightened by the penalty imposed.¹⁴⁵

The second element—communication—is necessary only to achieve the goals of general (not specific) deterrence.¹⁴⁶ In order for others who are thinking of engaging in criminal activity similar to that of the defendant to be deterred from doing so, the potential offender must be aware of what sentence was handed out in a particular case.¹⁴⁷ Sometimes a case of particular notoriety achieves this goal because it

supra note 110, at 96-97; *see also* United States v. Blarek, 7 F. Supp. 2d 192, 202 (E.D.N.Y. 1992) (discussing Jeremy Bentham's espousal of general deterrence).

138. *See* BECCARIA, *supra* note 125, at 62-63; PACKER, *supra* note 108, at 140; VON HIRSCH, *supra* note 115, at 31-32.

139. *See* Course Work, *Does Deterrence Work*, at http://www.courseworkbank.com.uk/coursework/does_deterrence_work_2020/ (last visited Nov. 3, 2003).

140. *See* J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 8.

141. *See* J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 8, 10.

142. *See* RADZINOWICZ, *supra* note 129, at 12.

143. BECCARIA, *supra* note 125, at 62-63; Johannes Andenaes, *General Prevention: A Broader View of Deterrence*, in CONTEMPORARY PUNISHMENT, *supra* note 110, at 109, 115-16.

144. *See generally* BECCARIA, *supra* note 125, at 42-43; J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 12.

145. *See* PACKER, *supra* note 108, at 140; RADZINOWICZ, *supra* note 129, at 10-11; VON HIRSCH, *supra* note 115, at 32.

146. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 13.

147. Andenaes, *supra* note 143, at 108-109.

receives saturation coverage in the media. Other times, proponents of general deterrence hope to get the message out by repeatedly assigning appropriate sentences in cases involving certain crimes.¹⁴⁸ For example, society has come to view driving under the influence of alcohol or drugs far more seriously than in past decades. While no one sentence may convey the seriousness with which society now views the dangers of this crime, proponents of general deterrence expect that when the public repeatedly hears that offenders were given tough sentences, others thinking of drinking and driving will not do so out of fear of the legal consequences.¹⁴⁹

In the late-nineteenth century, positivists dominated criminal justice theory.¹⁵⁰ Viewing Enrico Ferri as their intellectual father, the positivists were a broadly grouped combination of criminologists and others.¹⁵¹ They believed that the decision to engage in criminal activity was far more than an act of freewill on the part of the offender.¹⁵² Economic, social, environmental, psychological, anatomical and other factors particular to the individual criminal were believed to also play a role in the decision to violate the criminal laws.¹⁵³ The positivists thought ignoring these factors when sentencing, was to ignore reality.¹⁵⁴ The positivists focused not on the crime, but on the criminal himself.¹⁵⁵

This focus resonated from the idea that people commit crimes for different reasons, often not of their own making. Therefore, it is both wrong and ineffective to give everyone who commits the same offense a similar sentence.¹⁵⁶ Positivists thought it better to tailor the sentence to fit the offender, which achieves specific goals through the sentence.¹⁵⁷ These goals have been refined to incapacitation and rehabilitation.¹⁵⁸

Incapacitation is a theory of punishment whose goal is to separate offenders from society long enough so that they cannot offend again, in order to protect society.¹⁵⁹ Generally, sentences based primarily on

148. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 12-13.

149. *See generally id.* at 12.

150. *See id.* at 10; *see also* U.S. v. Blarek, 7 F. Supp. 2d 192, 200 (E.D.N.Y. 1998); K. Lee Boyd, *Are Human Rights Political Questions?*, 53 *RUTGERS L. REV.* 277, 312 n.176 (2001).

151. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 10-11.

152. *Id.* at 10-11.

153. *Id.* at 11.

154. *See generally id.*

155. *See id.* at 11, 23.

156. *Id.* at 23; *see generally* KARL MENNINGER, *THE CRIME OF PUNISHMENT*, at iii (Viking Compass ed., 1969).

157. *See* J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 11.

158. *Id.*

159. TEN, *supra* note 107, at 8.

incapacitation are reserved for the most dangerous of criminals, those who exhibit predatory and extremely violent behavior.¹⁶⁰ While incapacitacionists consider the crime committed, they are far more concerned with the criminal and the likelihood of his committing another serious offense.¹⁶¹ Incapacitation, perhaps more than any other theory of punishment, requires the sentencer to predict the future behavior of the defendant.¹⁶² This is normally done by looking at a variety of factors. These include the seriousness of the crime, how often in the past the defendant has committed similar crimes, psychological or other profiles of the offender that offer reasons for his extreme, irrational behavior, and any other clues that might exist regarding the offender's future dangerous conduct.¹⁶³ Often, these factors deprive the offender of the ability to desist from the serious and violent criminal behavior he previously exhibited.

There are many who commit criminal acts who do not need to be separated from society for extended periods of time either because they are not that dangerous to begin with or because the reasons behind their offenses can be removed or submerged. In one way or another, these individuals can be rehabilitated to the point where they will no longer commit criminal acts. Therefore, sentences of incarceration should be only as long as it takes for the individual to be rehabilitated from those elements that caused him to commit the crime.¹⁶⁴ Rehabilitationists believe that the vast majority of criminals commit crimes because of something in their psychological make-up, background, or environment that leads them to offend.¹⁶⁵

Based in positivist theory, rehabilitationists generally view it as wrong to punish based primarily on the act committed and to sentence all similar actors to similar sentences.¹⁶⁶ Some rehabilitationists see crime as a form of sickness or the result of other sicknesses.¹⁶⁷ As with recovery from any disease, different people take different periods of time to overcome those things that caused them to offend.¹⁶⁸ If the

160. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 13.

161. *Id.*

162. VON HIRSCH, *supra* note 115, at 104; *see also* J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 24.

163. VON HIRSCH, *supra* note 115, at 105; VON HIRSCH, *supra* note 107, at 87-88.

164. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 11, 23.

165. Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97, 98-99, 108 (1994).

166. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 11, 23.

167. Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2077 (2002); *see generally* MENNINGER, *supra* note 156 (discussing the notion of crime as a sickness).

168. J.M. Burns & J.S. Mattina, *Sentencing*, in KITTRIE & ZENOFF, *supra* note 132, at 23.

defendant is a substance abuser, perhaps his involvement in a drug or alcohol program would remove his need to commit crimes. If the problem is psychological, then counseling may be needed to deal with the source of the offender's criminal behavior. If the problem is environmental, then a more positive environment needs to be created for the offender. Sometimes that means merely changing the people and groups with whom he interacts by moving him to a different location. The source of the criminal behavior could also be economic. Perhaps a basic education or vocational training would eliminate the criminal's need to steal or burglarize because he would have a better chance of finding a job. The proponents of rehabilitation theory believe that it is a combination of some or all of these conditions that lead to the defendant's criminal behavior.¹⁶⁹

Whatever the cause of the behavior, however, rehabilitationists place their focus not on the offense committed as much as on what is needed to treat the offender and make it less likely that he will offend again.¹⁷⁰ Because every individual progresses at a different pace toward recovery, rehabilitationists find it illogical to set all sentences for a particular crime at the same or similar levels of punishment. Additionally, these individual differences make it impossible to gauge at the time of sentencing just how long it will take each offender to achieve the goals of rehabilitation.

Most judges, if asked, will say they use a combination of the above theories or utilize different theories in different cases.¹⁷¹ Although this may be true, such a claim should not be allowed to blur the difference in a sentence depending on the predominant theory used by the judge in a particular case.

One example would be when a man finds his spouse in bed with another man grabs a shotgun and shoots the spouse to death. This man has no criminal record and no history of such behavior. A judge placing greatest emphasis on incapacitation might say that this man is unlikely to pose a danger to the community and, therefore, sentence him to relatively little time in jail. Similarly, the rehabilitationist might not sentence the defendant to a prison term because the defendant only needs to work on anger management in extreme situations. Proponents of deterrence may regard the defendant's remorse and history as signs that he does not need a long prison sentence to be persuaded not to commit such an act again. Additionally, general deterrence based sentencers might focus on how much the shooting was

169. Adam Lamparello, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes Addition,"* 16 OHIO ST. J. ON DISP. RESOL. 335, 360 (2001).

170. See Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes,* 39 S.D. L. REV. 1, 42 & n.239 (1994).

171. See *infra* Part VI.B.7-8.

purely reactive versus how much it was planned. If the latter, the crime is more suited to a deterrence-based sentence. The more thought that goes into a criminal act the more likely it is that the offender can be persuaded not to commit such an act in the future by making the penalty for the current crime very harsh. Advocates of general deterrence will sentence the defendant according to how strongly they believe the message must unequivocally resonate that such shootings will not be excused or minimized because of the circumstances involved.

Retributionist sentencers may impose a much different sentence than the utilitarian-based sentencers discussed above. A judge with retributionist views might consider some of the factors used by other groups, including incapacitation, rehabilitation and deterrence, but ultimately he would likely still punish the defendant severely for the crime committed. This is because a judge relying primarily on retribution theory would not wish to deprecate the seriousness of taking a human life and, therefore, impose a heavy sentence on the defendant.

Often, a sentence based in retribution theory is harsher than one that looks for guidance to the utilitarian theories, but also the opposite is true on many occasions.¹⁷² One case that reached the Supreme Court that involved such a sentence was *Hutto v. Davis*.¹⁷³ The case involved Roger Davis, who was convicted in Virginia of the crimes of possession and possession with intent to distribute nine ounces of marijuana.¹⁷⁴ He was originally sentenced, by a jury and approved by the trial judge, to twenty years in prison on each charge, which ran consecutively.¹⁷⁵ In other words, Davis got forty years in prison for offenses involving nine ounces of marijuana.¹⁷⁶ This sentence was thirteen times longer than the average for defendants in Virginia who were convicted of similar offenses at the time.¹⁷⁷ When Davis was sentenced, the jury took into consideration a number of personal factors of the defendant.¹⁷⁸ The jury concluded Davis was a poor candidate for rehabilitation and determined that he needed to be deterred by a long sentence or incapacitated, lest he do other anti-social things.¹⁷⁹ A retribution-based sentence would require a relationship between the seriousness of the crime and the length of prison time given the

172. See Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 757 n.159 (2003).

173. *Hutto v. Davis*, 454 U.S. 370 (1982).

174. *Id.* at 370.

175. *Id.* at 371.

176. *Id.*

177. *Davis v. Zahradnick*, 432 F. Supp. 444, 453 (W.D. Va. 1977).

178. See *Davis v. Davis*, 585 F.2d 1226, 1228 (4th Cir. 1978).

179. See Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 120-21 nn.80, 87, 88 (1996).

defendant. Such a requirement would surely rule out a sentence of forty years for the crimes of which Davis was convicted.

Although the length of sentences can vary greatly depending on the predominant theory of punishment used by the sentencer, so too can the entire structure of a sentencing system turn on which punishment theories have the greatest influence on the criminal justice system. During the middle of the twentieth century, the utilitarian theories of punishment were used in most, if not all, American penal systems.¹⁸⁰ One result of this focus, particularly on rehabilitation and incapacitation, was the common use of the indeterminate prison sentence.¹⁸¹

The distinguishing feature of the indeterminate sentence is that at the time the judge issues the sentence, it is largely uncertain just how much time the defendant will actually be incarcerated.¹⁸² By contrast, a completely fixed sentence sets the duration of prison time at the instance the sentence is issued. The indeterminate sentence is consistent with the rehabilitation and incapacitation models of punishment because each of those theories looks primarily to the offender rather than the offense committed.¹⁸³ Indeterminate sentences condition the length of incarceration on the amount of time the defendant needs to be separated from society so he no longer poses a serious danger or the time it will take him to become rehabilitated.¹⁸⁴ As the length of time it takes to achieve these results varies with the individual offender, it is very difficult for the judge at the time of sentencing to determine how long a period of time the defendant needs to be incarcerated to achieve the desired results. Therefore, for a judge whose primary sentencing goals are either incapacitation or rehabilitation, it is better to wait and see how the individual defendant is progressing before deciding when he should be released.¹⁸⁵

While in theory sentences can be completely fixed (ten years in prison) or completely indeterminate (a period of time from one day to life to be decided later by the appropriate authorities), they are almost always neither completely fixed nor entirely indeterminate. During the mid-twentieth century, sentences were far more indeterminate and the range of minimum and maximum sentences far greater than they are today.¹⁸⁶ In California, for example, most of those con-

180. See generally Symposium, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1422-23 (2002).

181. *Id.*

182. See Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. L. REV. & WOMEN'S STUD. 255, 279 (1996).

183. Symposium, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 178-79 (2000).

184. See Barry C. Field, *Race, Politics, & Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1504-05 (2003).

185. See *infra* Part VI.D.

186. See Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 89-90 (2003).

victed of a felony were sentenced from a one-year incarceration to a period of time to be determined by the parole authority.¹⁸⁷ Maryland sentenced some offenders to the Patuxent Institution where their release date was determined primarily by how well they were rehabilitated while in the Institution.¹⁸⁸ Even in more standard systems of punishment, it was common to have sentences whose possible statutory ranges were wide (i.e., no minimum and twenty-five years maxi-

187. See, e.g., *In re Grant*, 18 Cal. 3d 1, 3-4 (1976). The defendant in *In re Grant* was convicted for the sale of marijuana and sentenced to state prison for ten years to life without the possibility of parole before ten years because of his prior narcotics conviction. *Id.* The defendant sought a writ of habeas corpus stating that his minimum period for parole eligibility constituted cruel and unusual punishment. *Id.* at 4-5. The Supreme Court of California directed the Adult Authority as follows:

"[T]o grant parole consideration to [the defendant] . . . without regard to the provisions of [the] former [statute]," because it constituted both cruel and unusual punishment, based on its overbreadth in absolutely prohibiting parole for substantial periods of time without regard to the gravity of the particular offense, the nature of the offender, or the existence of possible mitigating circumstances.

Id. at 16-18; see also *In re Lynch*, 8 Cal. 3d. 410, 413-14 (1972). The defendant inmate in *In re Lynch* applied for writ of habeas corpus to the Supreme Court of California contending that the indeterminate sentence, which was imposed by the California trial court as the aggravated penalty for second-offense indecent exposure, was cruel and unusual punishment. *Id.* Under the recidivist provision of section 314 [of the California Penal Code], defendant had been sentenced to prison for an indeterminate term, with a maximum life sentence. *Id.*; CAL. PENAL CODE § 314 (West 1999). The Supreme Court of California granted the writ and ordered the defendant discharged from custody, and held that the particular indeterminate sentence, imposed pursuant to section 314, was unconstitutional because of the unreasonably high maximum term. *In re Lynch*, 8 Cal. 3d. at 438-39; CAL. PENAL CODE § 314. The Court held that "when a defendant under an indeterminate sentence challenges that sentence as cruel or unusual punishment . . . the test is whether the maximum term of imprisonment permitted by the statute punishing his offense exceeds the constitutional limit, regardless of whether a lesser term may be fixed in his particular case." *In re Lynch*, 8 Cal. 3d. at 419.

188. See, e.g., *Dir. of Patuxent Inst. v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966). In *Dir. of Patuxent Inst.*, the Court of Appeals of Maryland found that the defendant had to be released from the Patuxent Institution because the defendant had been referred to the Institution for a diagnosis of possible defective delinquency. *Id.* at 24, 221 A.2d at 402. The court held that a person cannot be referred to the Institution until one or more of the five prerequisites of conviction for a specified crime existed. *Id.* The Maryland Defective Delinquent Act was established to protect society from persons who show a "propensity toward criminal activity." *Id.* at 32, 221 A.2d at 406. The Institution focuses on confinement and treatment in the means of rehabilitation, rather than punishment and deterrence. See *id.* The court in this case, however, found that the defendant had none of the prerequisites when he was referred and the county that referred the defendant erred in doing so because only the sentencing court could refer the defendant. *Id.* at 24, 221 A.2d at 402.

mum) and judges who frequently sentenced defendants to prison terms with wide ranges (i.e., five to fifteen years).¹⁸⁹

Attacks on the indeterminate sentencing system from both the left¹⁹⁰ and the right in the later half of the twentieth century resulted in far more determinate sentences.¹⁹¹ The ranges of sentences were markedly reduced¹⁹² and the focus of sentencing was on the crime more than the criminal.¹⁹³ Rehabilitation became a secondary concern in many punishment systems or even a non-existent one in some.¹⁹⁴ Foremost among these systems was the one adopted by the federal government.¹⁹⁵

In 1984, Congress approved the formation of a new and radically different sentencing system than had been used previously.¹⁹⁶ A point

189. See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941-42 (1988).

190. The left argued that they were unfair, discriminatory, and rewarded conformity in the institution rather than true rehabilitation. JESSICA MITFORD, KIND AND UNUSUAL PUNISHMENT 91-92 (Alfred A. Knopf ed., 1973). Ms. Mitford launches a withering attack on California's system of indeterminate punishments and the many unjust results it produces. See *id.* See also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

191. The right argued that they resulted in the release of dangerous criminals too early, rewarded inmates who were good at playing the game, led to too much sentencing disparity among those who committed the same crime, and focused too much on rehabilitating the criminal without sufficient concern for the harm to the victim and the seriousness of the crime. Stith & Koh, *supra* note 190, at 228; see also Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, at 234-35 (1984).

192. See Weinstein, *supra* note 186, at 91-92 (regarding federal sentencing guidelines); see also Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT. R. 69, Part II.A-B. (1999).

193. See Stith & Koh, *supra* note 190, at 284 (explaining that the Federal Sentencing Guidelines "view the relevancy of personal characteristics with skepticism").

194. See Ogletree, *supra* note 189, at 1953. Rehabilitation was one of the factors Congress instructed the Sentencing Commission to consider, 18 U.S.C. § 3553(a) (2000), but as Charles Ogletree notes, the Commission decided to consider rehabilitation and personal factors only in determining whether a sentence fits within the guidelines. *Id.* In his view, "[a] system that fails to consider the offender's personal characteristics places too great an emphasis on the harm caused by the offender's act and too little emphasis on circumstances that would serve to mitigate the punishment." *Id.* at 1953-54.

195. Although rehabilitation was one of the stated goals of the federal sentencing system, the Guidelines "failed to achieve a proper balance of the four theories of punishment, favoring retribution and general deterrence, and relegating rehabilitative efforts to those convicted of only the least severe crimes." Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 160 (1992).

196. Orrin A. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 187-88 (1993).

system was established that placed greatest emphasis on the crime committed and only looked to a small number of personal factors of the criminal, most of which were fairly objective in nature.¹⁹⁷ The systemic goal was to reduce almost entirely disparities in sentencing, thus ensuring that those who committed similar crimes received similar sentences.¹⁹⁸ Judges were given far less sentencing discretion both as to the range of their sentences and what factors they could use to govern their sentencing determinations.¹⁹⁹ While most states have not adopted stringent mandatory guidelines like those adopted by the federal government, many states have substantially changed their sentencing systems to limit the range of sentences and reduce their indeterminacy.²⁰⁰

Maryland, in limiting its range of sentences, establishing certain mandatory minimum sentences, adopting permissive sentencing guidelines, and creating sentencing review panels, has followed the national trend away from indeterminacy in sentencing and toward some limitation on judicial discretion. Unlike the federal government, however, Maryland still proclaims rehabilitation to be one of the primary goals of sentencing.²⁰¹ Furthermore, the guidelines that exist in the state are only advisory and are not followed by the judges in about half the cases before them.²⁰²

These differences in sentencing philosophy and structure are most significant when it comes to assessing the appropriateness of sentencing revision. In the federal system in which parole has been abolished, where rehabilitation is not a primary goal of sentencing, and curtailing disparity is a *raison d'être*, to allow judges to revise sentences would seem to be anathema.²⁰³ Sentencing revision is done most often to foster the goal of rehabilitation, and it can often result in offenders who committed the same crime, receiving markedly differ-

197. Ogletree, *supra* note 189, at 1949-50; *see also* 18 U.S.C. § 3553(a) (2000).

198. *See* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3-5 (1991); *see also* Paul H. Robinson, *A Sentencing System for the 21st Century*, 66 TEX. L. REV. 1, 8-9 (1987); Ogletree, *supra* note 189, at 1938-39.

199. *See* Robinson, *supra* note 198, at 2-3; Ogletree, *supra* note 189, at 1947, 1953.

200. Kevin R. Reitz, *ALI, Modern Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 557-58 (2002). At the end of the twentieth century, fifteen states were operating with sentencing guidelines and seven states had "entered active study processes moving toward such a framework." *Id.*

201. *State v. Dopkowski*, 325 Md. 671, 679, 602 A.2d 1185, 1189 (1992) (citing *Johnson v. State*, 274 Md. 536, 540, 336 A.2d 113, 115 (1975)).

202. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 4 (2002), available at <http://www.msccsp.org/publications/ar2002.pdf>. After falling below fifty percent in 1999 and 2000, the rate of judicial compliance with the guidelines rose to 50.9% in 2001. *Id.* at 7.

203. *See* Joseph S. Hall, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1342 (1999).

ent sentences.²⁰⁴ But in a sentencing scheme like Maryland's, allowing judges to adjust sentences after seeing how the offender is progressing in his efforts to deal with the problems that led him to offend, can greatly further the goal of rehabilitation.

V. ARGUMENTS FOR AND AGAINST REVISORY POWER

The wisdom and fairness of giving judges the power to modify sentences is the subject of much controversy among those involved in the criminal justice system. The most vocal critics of judges' power to reduce sentences have been prosecuting attorneys,²⁰⁵ victims' rights activists²⁰⁶ and some state legislators.²⁰⁷ Some of the critics are completely opposed to the practice of judicial sentence modification, while others would like to see a one-year time limit imposed, or the practice restricted to only non-violent crimes. The strongest support-

204. See Reitz, *supra* note 200, at 528.

205. See Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5. The bill to place a time limit on judges' revisory power was supported by the States' Attorneys Association and by many individual state's attorneys. See *id.* Montgomery County State's Attorney Douglas Gansler stated, "[t]he whole concept of reconsideration is institutionalized hoodwinking of the public" *Id.* Chief Felony Prosecutor for Prince George's County, Robert L. Dean, stated that "[reconsideration is] kind of the dirty little secret of the criminal justice system." *Id.* Although most prosecutors oppose the practice of sentence revision and would like to see it abolished or limited, our survey found that judges reported that a majority of motions for sentence reduction were not opposed by the prosecution. See *infra* Part VI.B.5.

206. See, e.g., Christian Davenport & Maureen O'Hagan, *Prosecutors Back Limits on Sentence Reductions*, WASH. POST, Feb. 8, 2001, at T3. Sheri DePetro, Executive Director of the STTAR center (a Howard County nonprofit that serves victims of sex crimes and child abuse) stated that giving judges the power to "reduce [offenders'] sentences makes a mockery of our criminal justice system . . ." *Id.* See also Katherine Shaver & Christian Davenport, *Second Looks at Sentencing: Duncan, Gansler Support Limits*, WASH. POST, Feb. 8, 2001, at T3. Michaele Cohen, Executive Director of the Maryland Network Against Domestic Violence stated that "she wants to ensure that victims are notified when a judge is asked to reduce their attacker's sentence." *Id.* See also Roberta Roper, Editorial, *Del. Vallario: For Victim's Rights*, WASH. POST, Feb. 17, 2001, at A30. Roberta Roper formed the Stephanie Roper Committee with the goal of changing the laws that address victims rights. See also STANDING COMM. ON R. OF PRACTICE & PROC., MINUTES OF R. COMM., at 8-9 (Mar. 9, 2001), available at <http://www.courts.state.md.us/rules/3-9-01.pdf> [hereinafter STANDING COMM.]. Robert L. Dean, Esq., member of the Criminal Subcommittee, stated that "[v]ictims of crime are upset when the sentence of the defendant is reduced." *Id.* at 6.

207. See, e.g., LeDuc, *supra* note 9, at C5. Del. Anthony Brown, "prompted by his outrage over a judge reducing the sentence of [a double murderer]," sponsored legislation to limit a judge's power to reconsider sentences. *Id.* See also Lori Montgomery, *Maryland House Rejects Limits on Judges: Delegates Approve Study of Resentencing After Panel's Unannounced Meeting*, WASH. POST, Mar. 22, 2001, at B2. "Sen. Christopher Van Hollen, Jr. (D) vowed to press ahead with a Senate bill to set a one-year limit on reconsiderations . . ." *Id.*

ers of the practice are various state judges,²⁰⁸ along with the criminal defense bar²⁰⁹ and their supporters in the legislature.²¹⁰ Many judges oppose any limitation on their revisory power, although some judges are not opposed to a time limitation. They believe, however, it should be two or three years, rather than the one-year limit proposed in the state bill.²¹¹

The argument most frequently advanced by opponents of sentence modification is that the convicted criminal is getting a benefit he or she does not deserve.²¹² After receiving all the protections of due process and being sentenced by a judge considering all relevant matters, the right to sentence revision offers the defendant a second chance to obtain a favorable sentence.²¹³ Allowing the convicted criminal this second chance takes away from the finality of the process²¹⁴ and de-

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208. See, e.g., Daniel LeDuc, *Townsend Invigorates Battle Over Judges' Sentencing Power; Lt. Governor Backs Measure to Limit Ability to Reduce Terms*, WASH. POST, Feb. 6, 2002, at B2. The Maryland Conference of Circuit Judges voted unanimously in 2002 to oppose the bills to limit the judges' revisory power. *Id.* See also Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5. Chief Judge Robert M. Bell of the Court of Appeals of Maryland, stated that Maryland judges "generally oppose [proposals to limit discretion]." *Id.* Numerous state judges have spoken out against limiting the judges power. *Id.* A few judges, however, have supported the one-year limitation. See also LeDuc, *supra* note 9. Retired Court of Appeals Judge John F. McAuliffe, a member of the Rules Committee, favors a one-year limit while acknowledging that the majority of judges favor "the status quo." *Id.*
209. See, e.g., Manuel Roig-Franzia & Matthew Mosk, *Resentencing Debated in Legal Community*, WASH. POST, Feb. 8, 2001, at T3. Criminal Defense Attorney T. Joseph Touhey stated, "it would be a mistake to impose strict sentencing guidelines, such as those employed in federal criminal cases." *Id.* See also Davenport & O'Hagan, *supra* note 206. Carol Hanson, Director of the Howard County Public Defender's Office, believes a judge's reconsideration power does have benefits, "especially when a drug offender has been rehabilitated." See *id.*
210. See, e.g., Lori Montgomery, *Miller Kills Bill to Curb Judges' Power*, WASH. POST, Mar. 28, 2002, at B1. "Senate President Mike V. Miller Jr. killed a bill that would have limited the power of Maryland judges to lower criminal sentences." *Id.* Del. Joseph F. Vallario Jr., Chairman of the House Judiciary Committee, "has opposed efforts to restrict the use of sentencing reconsideration." See Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5.
211. See, e.g., STANDING COMM., *supra* note 206, at 12-13. Judge Ellen Heller stated, "[i]f there is a two- or three-year period for these individuals to satisfy their probation and get out of the system, they may be able to stay off drugs and became [sic] productive citizens." *Id.*
212. See generally Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5.
213. MD. CODE ANN., CRIM. PROC. § 8-102 (2001). It could be argued that this is a third chance in that any person sentenced to more than two years imprisonment has a right to have the sentence reviewed by a three-judge panel. *Id.*
214. See LeDuc, *supra* note 208. "Citizens need to have confidence that a sentence really has meaning and finality." *Id.*

prives victims of the closure to which they are entitled.²¹⁵ Additionally, by sentencing defendants to a term of imprisonment and then later modifying the sentence to allow them their freedom earlier, the criminal justice system takes away from the notion of truth in sentencing.²¹⁶ Thus, the possibility of sentence modification well into the defendant's serving of his sentence is said to erode confidence in a system that seems always to be struggling to maintain even the barest level of public confidence.²¹⁷

While the power to revise sentences does take away from the finality of the original sentence, such finality would not be present in any event because of the possibility of pardon or executive clemency. Most prominent in creating this uncertainty as to how much time a defendant will ultimately serve is the possibility of parole.

Incarcerated defendants in Maryland have the possibility of obtaining parole after serving one-quarter of their original sentences,²¹⁸ or in cases of "violent crimes,"²¹⁹ one-half of their sentences.²²⁰ The members of the parole board, using statutory factors²²¹ and their own personal assessments of each inmate, determine whether the defendant will be released the first time he is eligible for parole or at any of several other junctures during his time in prison.²²² Victims are rarely told of this possibility when the sentence is imposed, and even if they are, the uncertainty is still present.²²³ Therefore, if by finality for victims, it is meant that they will know at the time of sentencing how long

215. See generally LeDuc, *supra* note 208. Senate Judicial Proceedings Chairman Walter M. Baker stated that "[t]here should be some closure to the victims' families." *Id.*

216. *Id.* Former Lieutenant Governor Kathleen Kennedy Townsend testified at a Senate Judiciary Committee Hearing that "[c]itizens raised concerns about truth in sentencing We need to maintain public confidence in our judiciary." *Id.*

217. See generally *id.* At a meeting of the Maryland Committee on Rules of Practice and Procedure, member Roger Titus stated to the Committee that he was "troubled by the public's lack of confidence in the courts." STANDING COMM., *supra* note 206, at 18. "The whole concept of reconsideration is institutionalized hoodwinking of the public, the press and victims of crime This is the type of procedure that breeds cynicism among the public in the justice system." Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5, at A1 (interviewing Montgomery County State's Attorney Douglas Gansler).

218. MD. CODE ANN., CORR. SERV. § 7-301(a)(1)(ii) (1999).

219. MD. CODE ANN., CRIM. LAW, § 7-101(m) (2002 & Supp. 2003). For the purposes of the parole statute, "violent crimes" are defined as those in section 14-101 of the Criminal Law Subject section of the Maryland Annotated Code and burglary in the first, second, or third degree. *Id.*; see also MD. CODE ANN., CRIM. LAW § 14-101(a) (2002).

220. MD. CODE ANN., CORR. SERV. § 7-301(c).

221. *Id.* § 7-301 (defining at what time an inmate is eligible for parole).

222. See *infra* Part VI.B.8 (describing factors considered when determining whether the defendant will be eligible for parole).

223. See generally Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5.

the defendant will be incarcerated, such finality will not be achieved with or without sentence revision.

Until 2001, the Maryland Rules did not require that victims be notified when an inmate had an approaching modification hearing, which often closed the door to having the victim's views expressed through the prosecution.²²⁴ Wisely, the Rules were amended to require that victims be notified when a hearing will be held on the defendant's request to have his sentence reduced.²²⁵

In order to foster public confidence in the system,²²⁶ and to make the process "more open,"²²⁷ the Rule was amended to require judges making sentence modifications to do so "only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard."²²⁸ The judge is also required to "file or dictate into the record a statement setting forth the reasons on which the ruling is based."²²⁹

Critics of sentencing modification argue that the power to alter the sentence once it has been imposed by the judge, and held valid by an appellate court, resides with the executive branch of the government.²³⁰ The traditional methods for sentence modification—parole,

224. Compare MD. R. 4-345 (2001) with MD. R. 4-345 (2003).

225. MD. R. 4-345(c) (2003). The Rule was amended, effective January 1, 2002, to require that the State's Attorney give notice to victims or their representatives of the filing of or hearings on a motion to modify sentence. *Id.* It also gives them the right to testify at any such hearing. *Id.* Rule 4-345(c) reads:

Notice to Victims. The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503 that states (1) that a motion to modify or reduce a sentence has been filed; (2) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (3) if a hearing is to be held, that each victim or victim's representative may attend and testify.

Id. Of course, this raises a different problem—that participation in the hearing will be emotionally difficult for the victim or victim's family. One family member of a victim, following a hearing on the killer's request for sentence modification, stated: "After it's all supposed to be over, you're getting slapped again . . . It's torture to put people through that." Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5.

226. See STANDING COMM., *supra* note 206, at 11-12, 18.

227. See generally Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5, at A1.

228. MD. R. 4-345(d).

229. *Id.*

230. See STANDING COMM., *supra* note 206, at 8. Robert Dean, a Prince George's County prosecutor and Rules Committee member, stated that "[t]he retention of control by a judge over the sentence blends the judicial function into the executive function, and [it] is not healthy." *Id.*

pardon and clemency—are all functions of the executive branch.²³¹ Parole, in part because of its applicability to almost all defendants, is said to be the appropriate vehicle for taking into consideration the kinds of factors that judges often use when modifying sentences.²³² Critics of sentencing modification question whether judges should have the power to usurp parole boards, thereby, creating an added mechanism by which defendants may have their sentences reduced.²³³

Sentencing modification advocates respond to critics by providing evidence that parole is an ineffective and inadequate means of determining which inmates should be released early and how soon into their sentences this release should occur.²³⁴ They cite evidence that the parole system in Maryland is overwhelmed by as many as 22,000 cases a year.²³⁵ The large number of cases makes it difficult for the Parole Commission to give each case in-depth consideration.²³⁶ Most parole hearings are held by video conferencing, which results in neither the hearing examiner nor the parole board ever meeting the inmate.²³⁷

Some people feel that the parole system is too sensitive to political pressures.²³⁸ Governors may not want to release even deserving inmates for fear of being labeled “soft on crime,” which would be a serious political liability.²³⁹ For example, former Governor Glendening refused even to consider parole for any defendant given a life sentence.²⁴⁰ It could be argued that the law, by distinguishing between

231. *Id.* “There are instances where sentences should be adjusted, but this should be handled by the executive branch of government. Executive power includes parole, clemency, and pardons.” *Id.*

232. Compare *supra* Part VI.B.8 (identifying criteria that judges use in modifying sentences), with MD. CODE ANN., CORR. SERV., § 7-305 (1999) (identifying factors and information to be considered during parole hearings).

233. See STANDING COMM., *supra* note 206, at 8. In an interview with the Washington Post, Anne Arundel County State’s Attorney Frank Weathersbee stated that “judges have been undercutting the authority of the parole board.” Roig-Franzia & Mosk, *supra* note 209, at T3.

234. See STANDING COMM., *supra* note 206, at 7-8 (statement of Committee Member Tim Maloney).

235. *Id.* at 7.

236. *Id.*

237. *Id.* Maryland Correctional Services Code section 7-304(e) “does not limit the authority of the Commission to hold a parole hearing through the use of a video conference or other means of electronic transmission.” MD. CODE ANN., CORR. SERVS., § 7-304(e). The Maryland Parole Commission has chosen to conduct the majority of parole hearings this way. Interview with Phillip Dantes, former Chairman, Maryland Parole Commission (May 15, 2003).

238. Lester Welch, Editorial, *Politics of Parole Boards*, WASH. POST, Oct. 21, 2001, at B6.

239. See Lori Montgomery, *Lawmaker Seeks to Expand Judges’ Power*, WASH. POST, Feb. 15, 2001, at B4.

240. *Id.* Persons given life sentences may be eligible for parole after either fifteen or twenty-five years, and such parole is contingent on “the approval of the Governor.” MD. CODE ANN., CORR. SERVS., § 7-301(d).

life sentences with and without the possibility of parole, contemplates that those sentenced to life with the possibility of parole would at least have their cases reconsidered at some time.²⁴¹ The Honorable Joseph Murphy, Chief Judge of the Court of Special Appeals of Maryland, views this kind of situation as one argument for retaining a judge's power to modify: "People otherwise eligible for parole are suddenly no longer eligible Well, a judge might want to make an adjustment for that."²⁴²

In part because of these reasons and in part beyond them, advocates of sentence revision maintain that judges are far better positioned to determine which convicted persons should have their sentences modified and specifically what forms these modifications should take.²⁴³ In contrast to the parole board, judges see the defendants personally and often get to know them in a manner different than that of the parole board.²⁴⁴ As several judges indicated in the Survey conducted in conjunction with this Article, judges are better able to gauge and keep track of the progress, or lack thereof, that an offender is making to deal with the root causes of his offense.²⁴⁵ Additionally, judges have far better knowledge of the crime itself, including the degree of culpability of the defendant, the role of the victim, the seriousness of any injury or loss, and the attitude of the defendant at the time of the crime.

Nonetheless, due to the problems that critics see as arising from the lack of finality created by sentence revision, some advocates want to place a time limit on how long after imposition of the original sentence a modification request could be heard. Specifically, some Maryland state legislators and prosecutors have proposed a one-year limitation.²⁴⁶ Supporters of sentence revision respond to this by asserting that a one year, or any fixed time period, is often not long enough to determine whether an offender has been rehabilitated and

241. See Montgomery, *supra* note 239, at B4. In *Lomax v. Warden*, an inmate serving a life sentence, and who had been recommended for parole by the Commission, challenged Glendening's policy as an *ex post facto* law in violation of Article 1, Section 10, Clause 1 of the United States Constitution and Article 17 of the Maryland Declaration of Rights. 356 Md. 569, 572, 741 A.2d 476, 478 (1999). The court denied his challenge, holding that the Governor's announcement of a policy on how he was likely to exercise discretion was not a "law" within the meaning of the constitutional prohibitions. *Id.* at 577, 741 A.2d at 481.

242. Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5, at A1.

243. STANDING COMM., *supra* note 206, at 7-8.

244. *Id.*

245. See discussion *infra* Part VI.

246. See Montgomery, *supra* note 210, at B7. This was the proposed limitations period in S.B. 73 and H.B. 61, which were rejected during the 2002 legislative session. *Id.* In an effort to gain support, the Senate bill was amended to raise the period to fifteen months. *Id.* This bill was approved by the Senate Judiciary Committee but withheld from a full Senate vote by Senate President Mike Miller. *Id.*

is deserving of sentence modification.²⁴⁷ Individuals progress at different paces, depending, for example, on whether they are engaged in educational, therapeutic, vocational or psychological programs.²⁴⁸ No one fixed time period fits all. Additionally, some programs are not available to offenders until they have served a certain amount of their sentence and other programs may have a waitlist that extends beyond a year or more.²⁴⁹

Another systemic argument advanced by opponents of the sentencing revision power is that modifying sentences creates disparity among judges regarding the sentences of individuals who commit the same or similar crimes.²⁵⁰ It is the view of most observers of the criminal justice system that disparity in sentencing practices creates unfairness in the system, which adds to the public perception of the entire criminal justice system as being unfair.²⁵¹ This perception has real consequences when it comes to matters such as funding and the degree of cooperation victims and witnesses are willing to provide in criminal cases.

Judges in Maryland, as in most other states, have great discretion within prescribed statutory limits regarding the sentence to be imposed.²⁵² To deal with the problem of sentencing disparity, Maryland has guidelines that are intended to encourage judges to sentence in a similar manner and that provide three judge panels to which the defendant can appeal his or her sentence.²⁵³ These guidelines, however,

247. STANDING COMM., *supra* note 206, at 7 (describing statement of Committee member Tim Malony).

248. *Id.* at 12-14 (describing a statement made by Judge Ellen M. Heller).

249. *Id.* at 11-13.

250. *See id.* at 8. Robert Dean, a member of the Committee on Rules of Practice and Procedure, stated that “[j]udges vary remarkably—some rule immediately, some hold the case for a long time. This scattered approach is chaotic.” *Id.*

251. *See* Montgomery & LeDuc, *Loopholes*, *supra* note 5, at A1.

252. *State v. Dopowski*, 325 Md. 671, 679, 602 A.2d 1185, 1189 (1992) (“At the outset we note that a sentencing judge in a criminal proceeding is ‘vested with virtually boundless discretion.’”) (quoting *Logan v. State*, 289 Md. 460, 480, 425 A.2d 632, 642 (1981)). The judge’s discretion is limited only in those cases where a specific or minimum sentence is mandated by the criminal code. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-201 (2002) (regarding murder in the first degree); *see also id.* § 4-204 (regarding the use of a handgun in the commission of a crime); *id.* § 14-101 (regarding mandatory sentences for crimes of violence). For example, a person convicted of murder in the first degree must be sentenced either to death, imprisonment for life without the possibility of parole, or imprisonment for life. *Id.* § 2-201(b). Section 14-101 of the Maryland Code lists twenty-one “crimes of violence” which carry a mandatory minimum sentence for a second or subsequent violation. *Id.* § 14-101(a). Section 4-204 of the Maryland Code mandates a minimum sentence of five years for use of a handgun in the commission of a felony. *Id.* § 4-204.

253. *See* MD. CODE ANN., CRIM. PROC. § 6-208 (2001); *see also id.* § 8-102. The Maryland Sentencing Commission “shall adopt sentencing guidelines that the Commission may change.” *Id.* § 6-208(a)(1). Any person sentenced to

are permissive,²⁵⁴ and in fact, recent statistics reveal that Maryland judges sentence outside the guidelines in approximately half of all criminal convictions.²⁵⁵ Whatever disparity that may occur as a result of sentence modification exists in large part because of the sentencing discretion afforded judges by law.²⁵⁶ Sentencing revision may create more disparity or conceivably less disparity—if the judge's original sentence was on the harsh side—but the disparity is not created by the right to revise sentences. The most that can be said in this regard is that revision offers judges a chance to create disparity a second time.

The systemic arguments advanced by those opposed to sentence revision often embody the principles of the retributionist approach to punishment discussed in Part IV. Retribution is one of the justifications for punishment that has been approved in Maryland and elsewhere. A retributionist is concerned almost exclusively with the sentencing result that the punishment fits the crime, a decision that can be made at the time of the original sentence.²⁵⁷

In Maryland, and virtually every other state, however, rehabilitation, incapacitation and deterrence are also valid considerations that inform a judge's sentence.²⁵⁸ These three utilitarian punishment justifications may arguably be implemented better at a time beyond the original imposition of sentence.²⁵⁹ How rapidly has the offender's alcohol, drug or psychological counseling progressed in making him less subject to the influences that were at the root of his criminal conduct? Has he or she made restitution, completed community service or fulfilled other obligations imposed by the judge for the betterment

more than two years imprisonment may have the sentence reviewed by a three-judge panel. *Id.* § 8-102(a).

254. *Id.* § 6-211(b). Regulations adopted by the Sentencing Commission "are voluntary guidelines that a court need not follow." *Id.*
255. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra* note 202. In 1999, only 41.8% of sentences fell within the guidelines. *Id.* The number increased to 48.8% in 2000 and 50.9% in 2001. *Id.*
256. *See* State v. Green, 367 Md. 61, 80, 785 A.2d 1275, 1285-86 (2001). Prosecutors have exactly the same very limited right to appeal a sentence whether it is an original sentence or a modified one. *Id.* In both cases, the state may appeal only if the judge has failed to impose a statutorily mandatory sentence. *Id.*
257. VON HIRSCH, *supra* note 115, at 31, 64. Retribution, or just deserts, seeks to punish an offender for the act committed commensurate with the harm inflicted and the moral wrongfulness of the act. *Id.* at 31. Andrew von Hirsch defines harm as "the injury done or risked by the criminal act." *Id.* at 64. In assessing wrongfulness or culpability, he looks to "the factors of intent, motive and circumstance." *Id.*
258. Jones v. State, 336 Md. 255, 265, 647 A.2d 1204, 1209 (1994); State v. Dopkowski, 325 Md. 671, 679, 602 A.2d 1185, 1189 (1992); Johnson v. State, 274 Md. 536, 540, 336 A.2d 113, 115 (1975).
259. Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5. Chief Judge Robert Bell of the Court of Appeals of Maryland opined that "[sentence revision] is flexibility aimed at the rehabilitation of the person in front of you If your aim is retribution, this thing doesn't make sense." *Id.*

of the victim or the offender? Does the offender still pose such a danger to the community that he needs to be separated from it? Has the offender been punished enough so that he will regard the consequences of being apprehended and punished for criminal conduct as outweighing the benefits of such conduct? Many judges and other proponents of sentence revision believe that all of these questions are best answered after observing the defendant for some time after his sentence has begun and that the judge is best positioned to evaluate them.²⁶⁰

Inextricably linked to the positions expressed immediately above is the belief that people looking forward to at least some possibility of reward are more likely to change their behavior in order to achieve that reward.²⁶¹ A prisoner who has an application for sentence reduction pending before a judge has much more incentive to behave properly and work toward improvement than one who has no possibility of release for many years.²⁶²

Such incentives are regarded as having benefits within penal institutions as well. Offenders are said to be less likely to cause trouble within custodial institutions if they know that by not engaging in such conduct, they increase their chances for having their sentences reduced.²⁶³ Motivational benefits deriving from an offender's awareness of the possibility of sentence modification occur in non-custodial

260. *Id.* "Maryland Judges want to retain flexibility with a goal toward rehabilitating defendants." *Id.* (interviewing Robert Bell, Chief Judge of the Court of Appeals of Maryland).

I think that it is often used in a rehabilitative approach that meets with everybody's approval, including the prosecutor's Many, for the first time in their lives, are meeting their goals. Is that all teary-eyed liberal rehabilitation stuff? Or is it better to throw the guy in for 18 months? I think it's a very legitimate use of the motion for reconsideration.

Roig-Franzia & Mosk, *supra* note 209 (interviewing Howard County Circuit Court Judge Dennis Sweeny).

261. Anne Arundel County Circuit Judge Joseph Manck testified before the House Judiciary Committee that sentence modification was "a tremendous tool we judges have. It's a very, very powerful incentive." Daniel LeDuc, *Maryland Judges Oppose Resentencing Curb; Testimony is on Bill to Set 1-Year Limit*, WASH. POST, Mar. 13, 2002, at CA13.

262. "I believe very strongly that somebody who has a motion for modification pending is going to be a better prisoner." Montgomery & LeDuc, *Sentences Without Finality*, *supra* note 5 (quoting Joseph Murphy, Chief Judge of the Court of Special Appeals of Maryland). This view is also held by many who work in the corrections system. Patricia Cushwa, the Chair of the Maryland Parole Commission, believes that the carrot-stick approach that is furthered by the possibility of sentence revision has a positive effect within Maryland's penal institution. Interview with Patricia Cushwa, Chair of the Maryland Parole Commission (Sept. 17, 2003).

263. The hope for a reduction in sentence is foremost in a prisoner's mind and has a substantial effect on a prisoner's performance in prison The court should have the right to look at an inmate's conduct in prison. When a motion for reconsideration is

sentences as well. Judges in Maryland often use sentence revision as a way of granting convicted defendants PBJ. PBJ is a means by which a judge can reward a defendant by having the conviction wiped off his record if he achieves the specific goals set by the judge. Many judges report changing a defendant's sentence to PBJ after completion of a prison sentence or after successful completion of the conditions of his probation.²⁶⁴ Many judges believe that offenders are likely to work harder to achieve these goals if they know they can come back before the same judge to demonstrate that their salutary behavior is now deserving of probation before judgment.

Those who argue against the need for sentence revision note that the judge can sentence the defendant to PBJ at the time when the original sentence is imposed.²⁶⁵ Should the defendant not abide by the conditions set by the judge, the probation can be revoked and the judge can impose any sentence that could have been imposed originally. Although this might be a satisfactory alternative in some cases, judges cite several limitations. First, pursuant to the statute, it cannot be used in all cases; for example, a second conviction for drug possession or any sentence over three years for District Court and five years for Circuit Court.²⁶⁶ Second, this procedure does not give the judge as much control as sentence reduction. With PBJ, judges are dependent upon the probation authorities to notify them if the defendant has violated the terms of the probation. With sentence reduction, the burden is upon the defendant to come before the judge and demonstrate that the conditions have been met.²⁶⁷

A final motivational advantage of the possibility of sentence revision involves the use of the defendant to assist in the capture of other criminals or in their prosecution. Sentenced defendants can be brought back before the judge and have their sentences reduced pursuant to an agreement with the prosecutor either that they disclose information the police need in a criminal investigation or that they agree to testify for the prosecution in cases related or unrelated to their own conviction.²⁶⁸

pending, the one person the inmate wants to impress the most is the sentencing judge.

STANDING COMM., *supra* note 206, at 7 (describing statement of Committee member Joseph Vallario).

264. *See supra* Part VI.C.2.

265. STANDING COMM., *supra* note 206, at 7. Robert Dean, an Anne Arundel County State's Attorney and Committee member said "[t]he legislature has dealt with this issue by providing for probation before judgment and a five-year period of probation." *Id.*

266. Crimes which are exempted from PBJ are listed at Md. CODE ANN., CRIM. PROC. § 6-220(d) (2001). *See also id.* § 6-227.

267. STANDING COMM., *supra* note 206, at 7 (detailing statements of Judge Anthony Vaughn and Chief Judge Joseph Murphy).

268. At least five judges reported in the survey that they had reduced sentences pursuant to the revisory power due to the defendant's cooperation with the

VI. SURVEY OF JUDGES' USE OF POWER TO REVISE SENTENCES²⁶⁹A. *Process and Goals*

During the 2002 session of the Maryland General Assembly, a bill was introduced to limit the power of judges to revise the sentences of convicted offenders downward pursuant to Maryland Rule 4-345.²⁷⁰ In response to the proposal, representatives of the MSBA testified before the Judiciary Committee of the House of Delegates. The crux of this testimony was that before action was taken to alter or revoke the revisory power of judges more information was needed, beyond merely the anecdotal, regarding the frequency and the manner in which judges use the revisory power.²⁷¹

While the above referenced bill never made it through the House of Delegates, the MSBA believed that any future consideration of the revisory power would benefit greatly from information gathered from court files and the views of judges concerning judicial use of this power. Accordingly, the MSBA formed a Task Force consisting of Buzz Winchester of the MSBA and Professors José Anderson, Stephen Shapiro and Steven Grossman (Chair), all of the University of Baltimore School of Law. As part of this process, a survey designed to gain some insight into their practices and beliefs about the revisory power was sent to all Maryland Circuit Court and District Court judges.

The survey instrument²⁷² was developed after consultation with the Maryland Sentencing Commission, representatives of the Conference of Circuit Court Judges, Maryland District Court Judges and Chief Judge Joseph Murphy of the Court of Special Appeals of Maryland.

Of the approximately 250 surveys sent out, seventy-six were returned. The Survey was designed not to get hard numbers (in large part because the judges have no real access to these numbers), but to ascertain the approaches that judges take and their reasons for doing so. Therefore, while the study does not yield results of a highly empirical nature, the seventy-six surveys that were returned reveal some

police or prosecution. *See supra* Part VI. One judge reported a case in which a defendant had been sentenced to thirty years, all but fifteen suspended after his conviction for carjacking and robbery with a deadly weapon. *Id.* In exchange for the defendant's cooperation and testimony in a murder prosecution, the judge revised the sentence to thirty years, all but two suspended. *Id.*

269. The survey data is available for review in the office of Professor Steven Grossman at the University of Baltimore School of Law.

270. S. 73, 2002 Leg., Reg. Sess. (Md. 2002); H.D. 160, 2002 Leg., Reg. Sess. (Md. 2002).

271. MD. STATE BAR ASSOC., 2003 PRELIMINARY STATE LEGISLATIVE PROGRAM: JUDICIAL POWER TO REVISE CRIMINAL SENTENCES (2003), available at http://www.msba.org/sec_comm/lawcomm/legislativeprogram/legislprogram.htm.

272. *Infra* Appendix.

clear trends regarding how judges approach and exercise the revisory power and do allow for the drawing of some significant conclusions.

The Survey was divided into two parts. The first part asked questions about the general approaches that the judges take when they receive a motion for sentence modification.²⁷³ The second part asked the judges to recall specific instances in which sentence modification was granted and asked questions about those cases.²⁷⁴

B. Results of First Part of Survey

1. How often granted?

Approximately seventy percent of judges reported that they granted motions for modification either never or rarely—thirty-nine out of fifty-six of those who responded appropriately to this question. The others said that they granted sentence modification motions frequently.

2. How long after the motion is filed?

The judges were asked how often they granted motions for sentence modification more than one year after the motion was made and how often after more than five years. The clear response of the judges was that the majority of motions for sentence modification that are granted occur within the first year of the defendant's sentencing. When looking at the second time period, the overwhelming result of the Survey was that judges rarely granted modification motions after five years.

Of the cases in which they granted sentence modification, most judges reported that only five percent or fewer of those modifications granted occur outside the one-year period—thirty-nine out of sixty-five judges reporting used a figure of five percent or less. Of the cases in which they granted sentence modification, over 4/5 of the judges reported that only one percent of those modifications granted occurred outside the five-year period—fifty-three of sixty-three reporting used a figure of one percent or less.

3. How often do defendants file motions for modification?

The response of the judges revealed no pattern as to what percentage of defendants file motions for modification. The numbers varied widely, from very few—one, five, and ten percent—to very many—ninety, ninety-five, and one-hundred percent. This may reflect the fact that judges have varying reputations for how seriously they consider modification motions, and accordingly defense attorneys routinely file motions with some judges and do not with others.

273. *Id.*

274. *Id.*

4. How often were hearings held?

Judges were asked how often they granted hearings when modification motions were made to them. Most judges said they granted hearings less than half of the time such motions were made—fifty-one of seventy-one judges reporting used the figure of fifty percent or less. As to the judges who reported granting hearings more than half the time, the percentage of hearings granted varied widely—up to ninety and one-hundred percent of the time for a few of the judges.

5. When hearings were held, how often was there no objection to sentence modification from the prosecutor?

Judges were asked whether in cases in which hearings were held, how often the prosecutor objected to the defendant's receiving some sort of sentence modification. Most judges reported that in the majority of cases, prosecutors made no objection to the granting of some sentence modification—forty-five of sixty-five judges responding said that prosecutors objected less than half of the time. Almost half of the judges reported that prosecutors did not object to modification in seventy-five percent or more of such cases—thirty-one of sixty-five judges responding.

6. How often were motions for modification denied?

This question, similar to the Survey's first question, attempted to get the judges to report in estimated numbers their sense of how often they deny modification motions. A clear majority of the judges reported that they deny such motions seventy-five percent or more of the time—forty of sixty-five judges responding. The numbers varied widely for the other judges.

7. What goals are to be achieved from holding the motion *sub curia*?

The judges were asked what goals they hoped would be achieved while they held the motion *sub curia*. By far, the goal that appeared most often on the Survey was that the defendant would make significant progress or complete a drug or alcohol rehabilitation program—fifty of the seventy-six survey forms mentioned this. Other goals mentioned by a significant number of judges were: waiting to see if the defendant paid monetary restitution (twenty-four); having the defendant successfully complete the period and terms of his probation (eighteen); seeing whether the defendant would stay out of trouble in one manner or another (twelve); seeing whether the defendant would complete or make significant progress in an educational program (twelve); determining whether the defendant had been rehabilitated (eleven); and seeing whether the defendant exhibited exemplary conduct while incarcerated (ten). Other goals mentioned less frequently were: completing community service (four); recognizing that the de-

fendant had been punished enough (four); to comply with the terms of a plea bargain that modification be granted or considered (two); to reflect the defendant's aging (one); giving the defendant a break as a first offender (one); and seeing that the defendant complied with a no contact order (one).

Clearly, the vast majority of the goals mentioned by the judges had to do with determining if the defendant rehabilitated him or herself in one manner or the other or that the defendant complied with terms of the original sentence, such as making restitution, performing community service or completing probation.

8. What criteria were used in deciding whether modification should be granted?

The judges were asked what criteria they used in deciding whether to grant sentencing modification motions. Not surprisingly, the responses to this question were somewhat similar to the ones immediately above.

This time, however, the question contained within it examples of some of the criteria generally accepted as reasons for granting such a motion: successful completion of an alcohol/drug/psychiatric treatment; exemplary conduct while serving a term of confinement; cooperation with law enforcement officers and/or prosecutors; payment of restitution; illness or injury; family and/or community support. On slightly less than half of the surveys returned—thirty-three out of seventy-six—judges simply wrote “all of the above” criteria were used. Of the judges who chose to mention criteria individually, the one mentioned most was participation in alcohol or drug rehabilitation programs (thirty-four), followed by: paying restitution (seventeen); completing probation (ten); exemplary conduct while incarcerated (six); staying out of trouble (six); cooperation with police or prosecutors (six); performing community service (five); becoming rehabilitated (four); participation in educational programs (four); illness or age (four); that the crime was a first offense (three); attempting to ameliorate the impact of changing parole guidelines (two); and the defendant's role as a victim (one).

C. Results of Second Part of the Survey

The judges were asked to detail three cases in which sentencing modification was granted.

1. What offense was the defendant convicted of when modification granted?

In providing examples of cases in which sentencing modification was granted, judges were asked first to state the offense involved. The most significant finding that emerged from this question was that four

classes of crimes were clearly mentioned most often by judges in the examples they gave. Those four were: theft offenses (twenty-one); driving while intoxicated or impaired (nineteen); simple possession of drugs (seventeen); and sale or possession with intent to distribute drugs (fifteen). Other classes of crimes mentioned were: some type of assault (six); robbery or attempted robbery (five); burglary or house-breaking (five); child abuse or contributing to the delinquency of a minor (three); manslaughter voluntary and involuntary (two); violation of probation (two); driving with a suspended license (one); murder (one); arson (one); and rape (one).

2. Other information provided involving specific examples cited.

The remainder of the information supplied by the judges does not lend itself to quantifiable findings, and even if it did, as the cases are self-selected, examples would not yield figures of any real empirical value. Still, the kinds of cases offered by the judges and their reasons for modifying sentences offer important insights into their practices.

The examples offered suggest that judges frequently use the revisory power to remove a criminal conviction in cases involving defendants who have succeeded in rehabilitating themselves in some meaningful way and whose further recovery may be negatively impacted by a criminal conviction on their record. Many of the examples mentioned involved typical drug possession or driving under the influence cases in which defendants that successfully completed drug or alcohol rehabilitation programs had their sentences of probation or short jail terms modified to PBJ.

There were, however, other cases involving more serious crimes, such as the man convicted of second degree assault for beating his wife who successfully completed a domestic violence program, went through intensive counseling with his wife and whose future employment prospects were seriously hampered by his conviction. Also, there was the woman suffering from a mental illness who had consensual sex with a minor that led to a conviction for contributing to the delinquency of a minor. She was awarded a PBJ after fully complying with the terms of her probation, obtaining psychiatric help and after a letter from her psychiatrist requesting the modification. One judge spoke of a serious case of arson in which a young man suffering from mental illness burned down the house of his grandparents. The judge required and received monthly letters from the defendant co-signed by the grandparents detailing the progress in his treatment, his activities and his plans. After some time, the judge modified his sentence of probation and gave the young man a PBJ. The judge reported that the young man recently graduated from the University of Maryland with a degree in engineering. Another judge told of a serious drug case in which the defendant had his sentence changed to a PBJ two

years after the original sentence and upon the defendant's successfully completing Job Corps and his acceptance into the U.S. Army.

Some judges have used the revisory power to shorten the jail sentences of defendants, occasionally in cases involving serious crimes. Often this is done because the judge finds that the defendant had an exemplary record within the correctional institution and that concrete steps have been taken by the defendant to deal with the root causes of what led him to commit the crime. Typical of such cases is a young man whose original sentence of ten years in prison was modified to three years because he had an excellent institutional record, took advantage of programs available to him, had the full support of his family and the fact that the crime for which he was incarcerated was his first offense.

In other cases, judges sought to change the sentence of defendants once they had served time in prison and were succeeding after their release. A defendant who had served prison time for manslaughter and had been released had his sentence modified nine years after his original sentence because of the nature of his crime (as a seventeen year old he shot a friend), his educational advancements while in prison, his remorse, and the fact that at the time of the modification, the defendant was gainfully employed and had the support of his family. At times, judges have used the revisory power to allow defendants to leave jail or prison early in order to enter intensive drug rehabilitation programs at the time when beds become available.

In still other cases, judges reported using their revisory power to address what they believed was a clear injustice. In one case, a man who was sentenced to eighteen months in jail for violating his parole on an original conviction of criminal contempt for failing to make child support payments had his sentence modified when a belated DNA test revealed he was not the father. One judge reported modifying a sentence nine years after the motion was filed because of the facts surrounding the defendant's original conviction and sentence. In this case, a retired judge had offered the defendant a concurrent sentence if he pled guilty to robbery with a dangerous weapon. The defendant refused the offer and upon being convicted after trial, received consecutive sentences that were ten to twenty years higher than those he would have received under the guidelines that were adopted after his sentence. The reporting judge modified the sentence to conform to the guidelines then in existence and noted that this also avoided the need to deal with the defendant's claim that his sentence was retaliation for rejecting the original plea. Another judge reported a defendant's receiving a mandatory twenty-five year no parole sentence for being a repeat violent offender. The violent offense for which he was convicted was daytime housebreaking in which the defendant stole a watch and some jewelry. His prior violent crimes were also daytime housebreaking convictions. Shortly after the defendant

was sentenced, the General Assembly removed daytime housebreaking from the list of violent crimes. The judge modified the defendant's sentence down to ten years.

D. Survey Conclusions

The results of the Survey indicate that a clear majority of the motions for sentence modification that are granted occur within one year of the time that the motion is filed. An overwhelming majority of those granted occur within the first five years after the motion is filed. It is also clear from the Survey that in a majority of cases in which modification is granted, such modification occurs without the objection of the prosecution. Although some crimes for which sentencing modification is granted are serious or violent felonies, the survey results suggest strongly that sentence modification is used, by far, most often for cases concerning theft, drugs, and driving under the influence of alcohol or drugs.

It is clear that judges use their power of revision to achieve various goals, most frequently ones related to the offender's ability to rehabilitate him or herself in one way or another or to address the damage resulting from the crime, such as by paying restitution. The direct result of judicial modification of sentences is that defendants receive a sentence that reduces or mitigates the sentence that was originally meted out to them. One indirect, but inevitable, result of this is that there will be an increase in the disparity of sentences given to defendants who commit the same crime. In a system that prizes consistency above all and is based on retribution as the primary, if not exclusive, theory of punishment (such as the federal sentencing system of mandatory guidelines), the use of a judicial revisory power would be anathema. In a system such as that which exists in Maryland, where theories of rehabilitation, retribution and deterrence are all accepted theories of punishment and where judges are afforded significantly more sentencing discretion than in the federal system, many judges believe that some disparity is a worthwhile price to pay in order to be able to tailor a sentence to the needs of the defendant and the community in specific cases. The vast majority of judges who responded to this Survey believe that the revisory power allows them the time and flexibility they need to better inform their determination of how best to accomplish these sentencing goals.

VII. RECOMMENDATIONS AND CONCLUSION

This Article has reviewed the power of sentencing judges in Maryland to modify a defendant's sentence. Maryland gives its judges some of the broadest powers and longest modification power of any state. They may reduce a sentence at any time during its duration, for any reason they deem proper, so long as the defendant has made a

motion within ninety days of sentencing and the revised sentence stays above any statutory minimum.

Not surprisingly, such broad power has its critics, and attempts have been made during the last several legislative sessions to put a one-year time limit on it. There is every reason to believe that this controversy will not go away, and that new attempts will be made to restrict the power of Maryland judges to modify sentences.

The authors of this Article believe that this judicial power should not be eliminated or significantly curtailed. In Maryland, judges are given great discretion at the time of sentencing to determine the proper punishment for the defendant, and they remain in the best position to determine later, whether this punishment should be changed. The authors believe that this judicial power compliments, rather than usurps, the executive parole function. It can be quite helpful, particularly in fulfilling the rehabilitative purposes of our penal system. If there have been a small number of abuses or bad decisions in the past, the new rules calling for victim notification and for judges to give their reasons for sentence reduction in open court should go a long way toward solving any existing problems.

The study done by the authors of this Article has shown that many judges use the possibility of sentence reduction as an effective incentive to shape a defendant's behavior, most often to complete drug or alcohol treatment. Establishing a one-year time limit would greatly interfere with this ability, because one year is often too short a period to determine if the defendant has completed the necessary steps to change his behavior.

Although, in the final analysis, the authors do not believe that any time limitation is necessary, if one is to be imposed, then a five-year period would be a more reasonable compromise. Under no circumstances, however, should a limit shorter than three years be imposed. Anything less than three years will severely interfere with the power of sentence reduction as a useful tool for changing defendants' behavior.

There has also been some consideration of eliminating or limiting the power in cases of violent crime. This is a more difficult, complicated question. On the one hand, judges appear to use this power very sparingly and only after careful consideration. On the other hand, the victims of violent crime and the public in general believe that dangerous, violent criminals should be kept off the streets for all, or at least the majority, of their original sentences.

It should be remembered that judges are already somewhat limited in their power to reduce the sentences of many violent offenders due to mandatory sentences for certain crimes. While this is a closer question, the authors believe that no other restrictions are necessary. Judges can continue to make these difficult decisions on a case-by-case

basis, just as they do at sentencing, under the scrutiny of prosecutors, victims, and the public.

If, however, judges' ability to modify the sentences of those convicted of crimes of violence is restricted, it should not be completely eliminated. There should still be some period of time, no shorter than 180 days, for the judge to reconsider any sentence, including for a serious, violent crime. The majority of states give judges this power, so they can reconsider whether a sentence is too harsh, or was handed down without adequate consideration of all relevant factors.

One thing that was determined during the research for this Article is that it was very difficult to get an accurate picture of when and how sentence reduction was being used, due to inadequate record keeping at the county level. There should be a requirement that judges transmit, and counties maintain, a record of each use of this power. This would make it much easier in the future to evaluate its use and/or abuse.

We also believe that the current requirement that a defendant file a motion for modification within ninety days is neither necessary nor helpful. Under current law, it would seem to be malpractice for a lawyer not to make this motion in every case, even though in most cases the judge is not asked to act on it immediately. Even though it may appear highly unlikely at the time of sentencing that the judge will ever modify the defendant's sentence, it is impossible to predict what might happen years into the future. Because there is no risk and little cost in time to file such a pro forma motion, and the consequences could be so devastating if it is neglected, it should always be filed.

But a motion that is, or should be, made in every case, merely to preserve a defendant's right to ask for modification years into the future (usually based on circumstances that haven't yet occurred) serves no valid purpose. It would make much more sense to require the motion at the time the defendant is actively seeking modification, based on facts or factors that are present at the time of the motion. If there is a time limit imposed on the judges' power, then the limit for making the motion should be ninety or 180 days before that limit.

APPENDIX

Please circle the most accurate term:

I (never) (rarely) (often) grant a motion for modification.

In approximately what percentage of the cases for which you have granted modification has it been over one (1) year: ____%; over five (5) years: ____%; after the motion was filed.

Please fill in the appropriate information:

Approximately ____% of the defendants I sentenced have filed a motion for modification.

I have held hearings in approximately ____% of the cases in which I was asked to modify a defendant's sentence.

In approximately ____% of the cases in which I held a hearing on a motion for modification, the State did not object to the defendant receiving some sort of modification.

General questions:

In approximately what percentage of cases have you denied a motion for modification? ____%

In cases in which you held a motion for modification *sub curia*, what are the goals that you hoped the defendant would achieve?

What criteria have you used in deciding motions for modification (*e.g.*, successful completion of alcohol/drug/psychiatric treatment; exemplary conduct while serving a term of confinement; cooperation with law enforcement officers and/or prosecutors; payment of restitution; illness or injury; family and/or community support)?

To the extent you are reasonably able, please provide the following information about cases in which you granted a motion for modification of sentence:

Case No. 1 (we appreciate that providing this information takes time, but please provide us with as many cases as time permits)

The offense that the defendant committed:

The sentence initially imposed:

The period of time between the initial sentence and the modified sentence:

The modified sentence:

The reason(s) why the motion was granted:

Case No. 2

The offense that the defendant committed:

The sentence initially imposed:

The period of time between the initial sentence and the modified sentence:

The modified sentence:

The reason(s) why the motion was granted:

Case No. 3

The offense that the defendant committed:

The sentence initially imposed:

The period of time between the initial sentence and the modified sentence:

The modified sentence:

The reason(s) why the motion was granted: